TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE

No. 267

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLANTS,

vs.

THE ALTON RAILROAD COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

FILED { MAY 29, 1941. / JULY 12, 1941.

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IN THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

THE ALTON RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company; Chicago and North Western Railway Company; Chicago Burlington & Quincy Railroad Company; Patrick H. Joyce and Luther M. Walter, Trustees of Chicago Great Western Railroad Company; Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Wilson McCarthy and Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company; The Denver and Salt Lake Railway Company; Duluth, Winnipeg and Pacific Railway; Great Northern Railway Company; Illinois Central Railroad Company; Kansas City Southern Railway Company; L. C. Sprague, Receiver of The Minneapolis and St. Louis Railroad Company; G. W. Webster and Joseph Chapman, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri and Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company; Northern Pacific Railway Company; J. M. Kurn and John G. Lonsdale, Trustees of St. Louis-San Francisco Railway Company; Berryman Henwood, Trustee of St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas and Pacific Railway Company; Union Pacific Railroad Company; Norman B. Pit-
[fol. 5] cairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company; T. M. Schumacher and Sidney M. Ehrman, Trustees of The Western Pacific Railroad Company; Illinois Terminal Railroad Company; Litchfield and Madison Railway Company; Grand Trunk Western Railway Company; The New York Central Railroad Company; The Chesapeake & Ohio Railway Com-

pany; Detroit, Toledo and Ironton Railroad Company; C. E. Denney and John A. Hadden, Trustees for Erie Railroad Company; Chicago and Erie Railroad Company; The Colorado and Southern Railway Company; John T. Cochrane, Jr., Trustee of Alabama, Tennessee & Northern Railroad Corporation; Apalachicola Northern Railroad Company; Atlanta, Birmingham and Coast Railroad Company; Atlanta & Saint Andrews Bay Railway Company; Atlanta and West Point Rail Road Company; Atlantic Coast Line Railroad Company; Carolina, Clinchfield and Ohio Railway; H. D. Pollard, Receiver of Central of Georgia Railway Company; Charleston & Western Carolina Railway Company; Columbia, Newberry and Laurens Railroad Company; Columbus and Greenville Railway Company; Danville and Western Railway Company; W. R. Kenan, Jr., and S. M. Loftin, Receivers of Florida East Coast Railway Company; W. V. Griffin and H. W. Purvis, Receivers of Georgia & Florida Railroad; The Georgia Northern Railway Company; Georgia Railroad; Gulf and Ship Island Railroad Company; Gulf, Mobile and Northern Railroad Company; Interstate Railroad Company; Louisville and Nashville Railroad Company; Macon, Dublin & Savannah Railroad Company; Mississippi Central Railroad Company; C. E. Ervin and T. M. Stevens, Receivers of Mobile and Ohio Rail Road Company; The Nashville, Chattanooga & St. Louis Railway; Norfolk and Western Railway Company; Morris S. Hawkins and L. H. Windholz, Receivers of Norfolk Southern Railroad Company; Piedmont and Northern Railway Company; Savannah and Atlanta Railway Company; L. R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company; Southern Railway System; Tennessee, Alabama and Georgia Railway; [fol. 6] Tennessee Central Railway Company; The Western Railway of Alabama; Winston-Salem Southbound Railway Company; The Yazoo and Mississippi Valley Railroad Company, Plaintiffs,

v.

United States of America; Interstate Commerce Commission; and John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, Defendants

COMPLAINT—Filed July 14, 1939

To the Honorable Judges of the District Court of the United States for the Eastern District of Michigan:

For their complaint, plaintiffs state:

1

The plaintiffs are common carriers of property by railroad, and are, as stated in the title of this action, corporations duly organized and existing or trustees or receivers, duly appointed and qualified, of railroad corporations.

[fol. 7] 2

The defendant, John P. Fleming, is an individual doing business under the firm name and style of John P. Fleming Driveaway Service, and his residence is in the City of Detroit, Wayne County, Michigan.

3

This is a civil action, under Paragraph 28, Section 24, Judicial Code (28 U. S. C. 41 (28)). To enjoin and annul an order of the Interstate Commerce Commission, as hereinafter more fully appears.

4

The defendant, John P. Fleming, doing business as John P. Fleming Driveaway Service, filed application with the Interstate Commerce Commission on February 12, 1936, for authority under the so-called "grandfather clause" of Section 206 (a) of the Motor Carrier Act, 1935 (49 U. S. C. 306 (a)), to wit:

"Provided, however, that, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * The Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is

made to the Commission as provided in paragraph (b) of this section and within one hundred twenty days after this section shall take effect."

to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chassis, unfinished automobiles, and all other automotive vehicles between points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington, over irregular routes.

5

The plaintiffs and others intervened in opposition to the granting of such application and appeared at and participated as protestants in the hearing of said application before the Examiner to whom said application was referred for hearing.

[fol. 8] 6

The report of the Examiner was served on September 10, 1937, and the plaintiffs filed timely exceptions to said report. The Interstate Commerce Commission, by Division 5, Commissioners Eastman, Lee, and Rogers, filed its report and order on September 19, 1938 (8 M. C. C. 469), and copies of said report and order are hereunto annexed, marked Exhibits A and B, respectively. Thereafter, plaintiffs filed a petition for reargument and reconsideration by the entire Interstate Commerce Commission of the said report and order of the Commission by Division 5. On December 5, 1938, the Commission denied said petition. Thereafter, after the decision of the Supreme Court of the United States in *McDonald* v. *Thompson* on December 5, 1938, plaintiffs filed a supplemental petition for reargument and reconsideration by the entire Commission of said report and order, and said supplemental petition was denied on March 6, 1939.

7

One or more of the plaintiffs are engaged in carrying, or are participating in the carriage of, new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate commerce, from Detroit, Michigan, for delivery to all points in the states into which said defendant

is authorized to operate by said report and order, and are competitors of said defendant for said traffic, and are prejudiced and injured by said report and order.

8

In making said report and order the Commission exceeded its lawful authority and erred in its construction and application of the Motor Carrier Act, 1935, in that part of said report and order which is the following:

"We find that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new [fol. 9] automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation. * * *."

"Upon compliance by applicant with the requirements of Sections 215 and 217 of the Act, and our rules and regulations thereunder, an appropriate certificate will be issued."

in the following respects:

(a) In that the evidence before the Commission fails to show that said defendant was engaged on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce from Detroit, Michigan, on the one hand, to all points in any of the following states: Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand.

(b) In that said evidence fails to show that said defendant was engaged on June 1, 1935, and has been so engaged since that time, as a common carrier by motor vehicle in

driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to any points other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia, Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

(c) In authorizing said defendant to serve all points in the states to which service is authorized by said report and order, in that said evidence fails to show that said defendant [fol. 10] was engaged on June 1, 1935, and has been engaged since that time, in transporting said vehicles or chassis from Detroit, Michigan, on the one hand, to more than two points in any of said states.

(d) In holding upon the following finding or conclusion:

"Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in each of the States of Arkansas and Alabama; shipments to two points in each of the States of California, New York, Pennsylvania, and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia."

and the evidence before the Commission, that said defendant is entitled to a certificate of public convenience and necessity to serve all points in the states to which service is authorized by said report and order.

(e) In holding that said defendant, by serving one or a few points in a state on and since June 1, 1935, is entitled to a certificate of public convenience and necessity to serve all points in the state.

(f) In authorizing said defendant to serve any point in the state of Oregon, because said evidence shows that said defendant was on and prior to June 1, 1935, operating into and in said state as a contract carrier and not as a common carrier, and has so operated since that time as a contract carrier and not as a common carrier.

(g) In authorizing said defendant to serve any point in the states of Oregon, California, Arkansas, and Texas, be-

cause said evidence fails to show that said defendant was on June 1, 1935, complying with, and since that time has complied with, the laws of said states which regulate, license, and tax his operations on the public highways; but on the contrary the evidence shows that said defendant did not comply, and has not complied, with said laws at said times.

(h) In authorizing said defendant to operate over irregular routes in the states designated in said report, because [fol. 11] said evidence shows that on and prior to June 1, 1935, and since that time, said defendant was operating over regular routes in said states.

(i) In authorizing said defendant to operate through the states of Idaho, Iowa, Kansas, Missouri, Nebraska, Oklahoma, and Wyoming, because said evidence fails to show that said defendant was on June 1, 1935, and prior thereto, complying with, and since said time has complied with, the laws of said states which regulate, license, and tax his operations on the public highways, but on the contrary the evidence shows that said defendant did not comply, and has not complied, with said laws at said times.

9

The Commission exceeded its lawful authority, and erred, in failing to hold that the defendant, John P. Fleming, was required to prove, and had the burden of proof to establish, that he was operating on June 1, 1935, and has operated since that time, in compliance with the laws regulating licensing, and taxing his use of the public highways of the States of Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, Washington, Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming.

10

The Commission exceeded its lawful authority, and erred, in admitting or considering as evidence upon which to base its order, what is described in said report as an "exhibit purporting to show additional transportation he had performed," for the reasons that the same is hearsay, and a self-serving declaration, and no opportunity was afforded plaintiffs to cross-examine said defendant with reference to the same, and no copy thereof was furnished to plaintiffs.

[fols. 12-13] Wherefore, plaintiffs pray:

(1) That a District Court of three judges be organized as provided in Title 28, U. S. C., section 47, to hear this cause.

(2) For interlocutory injunction restraining the defendant, John P. Fleming, from operating under the authority of said order of the Interstate Commerce Commission, and from carrying on any of the operations authorized or described in said report and said order.

(3) That upon final hearing said order be annulled and the defendant John P. Fleming be permanently enjoined from carrying on any of the operations authorized or described in said report and said order.

(4) That plaintiffs have all other relief to which they may be entitled, and that they may recover costs.

Henry P. Stacy, Michigan Central Terminal Bldg., Detroit, Michigan; Frederick V. Slocum, 441 E. Jefferson Ave., Detroit, Michigan; Joseph H. Hays, Richard W. Sharpless, Amos M. Mathews, 204 South Canal St., Chicago, Illinois, Attorneys for Plaintiffs.

Duly sworn to by Henry P. Stacy, jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO COMPLAINT

Interstate Commerce Commission

No. MC-48654

John P. Fleming Common Carrier Application

Submitted January 19, 1938. Decided September 19, 1938

Applicant found entitled to continue operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis from Detroit, Mich., to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, over irregular routes through the States of

Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming, by reason of having been engaged in such operation on June 1, 1935, and having continued such operation since that time. Certificate granted. Application denied in all other respects.

Carney D. Matheson and *George S. Dixon*, for applicant.

Daniel C. Rogers for Public Service Commission of Missouri.

Joseph H. Hayes and *Frederick V. Slocum* for protestants.

K. F. Clardy, Louis E. Smith, Bernard W. Butler, George M. Kellogg, Jr., J. F. Diskin, George B. Wright, Henry P. Stacy, E. F. Moberg, S. E. Gregory, R. P. DeCamp, L. S. Harris, Julius Weiss, and *George A. Dougher* for interveners.

Report of the Commission

Division 5, Commissioners Eastman, Lee, and Rogers

By Division 5:

Exceptions were filed to the recommended order of the examiner to whom the matter was referred, and oral argument was had. Our conclusions differ in some respects from those recommended.

By application,[1] as amended, filed February 12, 1936, John P. Fleming, of Detroit, Mich., doing business as John P. Fleming Driveaway Service, seeks authority to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chassis, unfinished automobiles, and all other automotive vehicles between points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and Washington, over irregular routes. The Public Service Commission of Missouri intervened in opposition to the granting of the application. The Railroad Commission of Texas protested [fol. 15] the granting of the application, but was not represented at the hearing. National Automobile Transporters Association, Automobile Contract Carriers Association, and International Harvester Company intervened and pre-

[1] Under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935.

sented testimony on questions relating to jurisdiction. Numerous motor carriers of automotive vehicles, individuals, Nicholson Universal Steamship Company, Detroit-Cleveland Navigation Company and Central Freight Association, western, and southern rail lines, and numerous railroads entered appearances at the hearing, but did not present any evidence.

Applicant's operations were conducted on June 1, 1935, solely by the driveaway or caravaning method of transporting motor vehicles. By this method, the transportation is performed by (1) individual driving of the vehicle under its own power; (2) driving one vehicle under its own power and towing a second vehicle attached to the first by a mechanical device generally called a tow-bar; (3) by bolster mount or full mount which consists of driving one vehicle under its own power and upon which another vehicle is partially (front wheels) or wholly mounted, or combinations of both.

These methods of conveying the traffic suggest the desirability of a brief discussion of whether the transportation performed is within the jurisdiction conferred upon us by the Act. As indicated below, no question appears to exist so far as towing of a vehicle is concerned. The dictionary definition,[2] in a limited sense, however, leaves the impression that "transportation" may be something other than the movement of an automotive vehicle under its own power. Corpus Juris defines "transporting" as follows:

> As commonly understood, one is transporting an article when he is conveying it from one place to another. Transporting includes towing.

In their interpretation of federal statutes making transportation of a stolen motor vehicle, in interstate commerce, a criminal offense, the courts have uniformly held in sustaining convictions that driving of the vehicle under its own power is transportation. See *Whitaker* v. *Hitt*, 285 F. 797, *Hostetter* v. *United States*, 16 F. (2d) 921, and *Piper* v.

[2] Act of transporting, or state of being transported; carriage; removal; conveyance—Webster's New International Dictionary. Under the definition of "Convey", this authority asserts that the synonym "transport" implies an actual carrying, as by vehicle or vessel.

Bingamon, 12 F. Supp. 755. We conclude that the methods followed by a- applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

Under part I, we have consistently regarded the movement over other than the owning railroad of locomotives under their own power as transportation. Tariff rates for such transportation are provided by rail carriers, and in certain instances we have approved a basis of rates therefor. See *Investigation and Suspension Docket No. 23*, 21 I. C. C. 103, and *Locomotives from and to the South*, 211 I. C. C. 114.

Applicant's documentary evidence of operation consists of certain shipping records of the transportation of passenger vehicles and trucks from the factories of automobile manufacturers in Detroit, Mich., to various points in the States covered by the application. No shipments are shown as having originated at a point other than Detroit. After the hearing, pursuant to permission granted by the examiner, applicant also submitted an exhibit purporting to show additional transportation he had performed. No copies of billing or other documentary evidence were furnished in support of this exhibit.

[fol. 16] The evidence described indicates that applicant commenced operations during the first part of the year 1933, from which time July 1936, applicant transported, or participated in the transportation of, more than 2,100 vehicles. The shipping papers introduced cover approximately 400 of these vehicles. The shipments consisted of from 1 to 16 vehicles, although shipments of 2 and 4 vehicles by far exceed shipments of any other quantities. Certain of the shipments covered by documentary evidence were transported by the driveaway method from the plants in Detroit to the docks of steamship lines in that city for transshipment by water to interstate destinations. The record is silent, however, as to whether this transportation was a part of a through shipment, effected by joint transportation of two carriers under common control, management, or arrangement, and whether this transportation is subject to our jurisdiction cannot therefore be determined at this time, it also appears from the testimony that applicant transported used cars in interstate commerce between vari-

ous points in the States covered by the application. Transportation of this character is not supported by documentary evidence, and the oral testimony does not warrant the conclusion that it was other than sporadic or that applicant was regularly engaged in such transportation. Certain new cars were returned to Detroit for various reasons. The return of vehicles refused by distributor or dealer would appear to be a necessary incident to the business in which applicant is engaged.

Applicant urges that authority to serve all points in the States covered by the application is essential to the business conducted. The operation in each State in which transportation is claimed to have been performed is outlined below. The figures given include both the shipments, proof of which is established by shipping papers, and the shipments listed on the exhibit submitted after the hearing.

Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in each of the States of Arkansas and Alabama; shipments to two points in each of the States of California, New York, Pennsylvania, and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia.

As to the States other than California, New York, Pennsylvania, Arkansas, Texas, Oregon, and Washington, applicant transported numerous shipments to the points served. Only two shipments were transported to California, these being to San Jose on August 14, 1934, and to Los Angeles on May 22, 1935; to Pennsylvania points, the shipments consisted of two movements one to Pittsburgh on May 7, 1935, the other to Warren on April 18, 1935; to New York points the two shipments handled moved to Buffalo on April 22, 1935, and to Cortland on May 12, 1935. After June 1, 1935, only one shipment was transported to New York or Pennsylvania points. In response to a question concerning operations to New York and Pennsylvania points, applicant stated that he had not regularly held himself out as engaged in performing transportation to those States. No shipping papers covering movements to California, New York, and Pennsylvania were submitted, and there is very little testimony relative thereto. Operations to Arkansas, Texas, Oregon, and Washington were not

started until 1935. It appears, however, that by June 1, 1935, a fair volume of traffic had been moved. The three shipments to Arkansas aggregated 25 vehicles; four shipments to Texas aggregated 14 vehicles; four shipments to Oregon aggregated 24 vehicles; and five shipments to Washington aggregated 28 vehicles.

It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the States served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specific points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which the automobile manufacturers have established distribution facilities; a manufac- [fol. 17] turer could not for many reasons appoint an indefinite number of dealers or distributors for a given territory. Approximately 1,200 vehicles were transported by applicant in the period from January 1934, to June 1935, yet relatively few points were served. This further indicates that applicant's opportunity for service was found at a very limited number of distribution points. An exhibit introduced at the hearing contains figures and supporting data based upon which it is estimated that in the year 1935, less than seven per cent of all new automobiles sold in twenty-four western States were transported by the driveaway method.

As basis for authority to serve all points in a State, applicant points out that distribution points are constantly shifted from the standpoint of a State-wide area; dealers' accounts changed; and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206 (a) of the act, the provisions of which require in substance that the authority granted shall per-

mit a carrier to conduct the bona fide operations it was conducting on June 1, 1935. *In Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, we said that: "In the case of a common carrier of household goods or of oil field supplies, serving a large territory over irregular routes, we grant certificates under the 'grandfather' clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting 'grandfather' certificates to haul 'general commodities', that each and every commodity within that description has actually been carried. The question is whether there has been operation within the 'grandfather' period consistent with the holding out in the natural and normal course of business." It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends, for its traffic, entirely upon one industry. This principle should obtain especially where the traffic in question is available only through the distribution and sales of such commodities as automotive vehicles.

Applicant was engaged in furnishing a highly specialized transportation service. Direct competitors appear to have been few in number, although the record contains no definite statement concerning this phase of the operating conditions. Applicant's service was, according to our view, necessarily confined to deliveries at a very few points, and future opportunities of obtaining traffic, no doubt, will be likewise limited. This is true even though applicant has at all times held his services out to the public generally.

Question is raised as to whether applicant has operated as a common or contract carrier. The evidence indicates that the business performed was obtained by solicitation of dealers and distributors engaged in merchandising automotive vehicles; that applicant would transport for anyone requesting him to do so; that he held himself out to transport by the driveaway method between any points in the States for which application is made; and that he has no written contracts. The plan of operation outlined contains all the incidents of common carriage.

Protesting rail carriers contend that applicant's operations were not bona fide in character because he failed to procure certificates from the States through or into which he conducted operations. Applicant, however, made inquiry as to certificate requirements of the States and he testified that to the best of his information certificates were

not required with one or two exceptions. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas were introduced and applicant holds certain permits issued by the States of Oregon and Nebraska.

[fol. 18] The Missouri Public Service Commission decided on December 24, 1935, that a carrier such as applicant was subject to a Missouri law, approved in 1929, designed to regulate common and contract carriers by motor vehicle. Upon being informed of the certificate requirements in Missouri, applicant discontinued transportation over the highways of that State. It is urged that applicant's failure to continue the transportation of automobiles over highways through the State of Missouri operates as a forfeiture of rights in that State under the "grandfather" clause. The provision of the act in question, however, deals only with interruption of "service"; since applicant did not serve any point in Missouri, no issue under the provision referred to is involved. Applicant had operated over highways through Missouri in making deliveries to Texas points. He stated, in this connection, that deliveries to the Texas points can be made by the use of highways through Kentucky and Arkansas and that the highways through these States offer a quite satisfactory route. Operations begun over routes through Kentucky and Arkansas after the statutory date raise no issue under the "grandfat' '" clause, as there was no change in the territory serv Since the authority herein granted does not limit applicant to operation over specified routes and in view of our interpretation of the Act with respect to the provisions thereof relating to "interruptions of service," it is further our view that the application so far as it requests authority to operate in interstate commerce over Missouri highways should be granted. Compliance by applicant with the applicable laws of Missouri is a matter that rests between applicant and the State authorities.

Protestants' principal arguments are directed to questions of whether applicant may serve all the points in the States for which application is made; whether, in view of infrequent service to various points in the States claimed, certain rights were not thereby abandoned; and whether applicant should or should not be limited to the particular routes from Detroit to key points in the territory actually served, deliveries thereafter to be made over irregular routes. In deciding these questions, it is also necessary to

take into consideration the type of operation, frequency of the demand of the consignees for which the carrier performs transportation services, and the nature of the industry served. The record is convincing that the applicant's operations have been, and will continue to be, irregular in nature because of conditions under which he may secure traffic. The same proof with respect to territory served that might be required of a general commodity hauler, therefore, cannot be imposed, nor can operations be confined within the same definite limits. Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington, such restrictions apparently would not be in accordance with the operations performed on the statutory date. The fixing of specific termini would also prevent his rendering the type of service he has been performing.

The operations proved in the States of New York and Pennsylvania do not afford justification for the granting of a certificate. On the showing made as to deliveries to New York and Pennsylvania points, it could be that shipments to these points were included with the vehicles delivered by applicant for lake movement beyond the Detroit docks. In any event, the New York and Pennsylvania operations would not establish a valid claim to grandfather rights. Although operations to Arkansas, Texas, Oregon, and Washington were started just prior to June 1, 1935, they were sufficient in scope to establish that applicant was in bona fide operation to those States on the statutory date. As to the other States claimed, we view the transportation performed as justifying the authority sought.

We find that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes [fol. 19] through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the con-

tinuance of this operation. As an incident to the operation, applicant may transport to Detroit from any point in the States to which service is herein authorized, any new vehicle or chassis that has been rejected by a dealer or distributor. The application in other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent that issuance of a certificate is authorized by our findings herein.

EXHIBIT "B" TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 19th day of September, A. D. 1938

No. MC-48654

John P. Fleming Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That the said application be, and it is hereby, denied, effective October 26, 1938, except to the extent that the issuance of a certificate of public convenience and necessity is authorized by the findings in said report.

And it is further ordered, That applicant be, and he is hereby, notified and required to cease and desist, on or before October 26, 1938, from operations as a motor carrier covered by said application other than those authorized in said report.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT JOHN P. FLEMING—Filed August 4, 1939

Now comes John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, so impleaded as one of the defendants in the above entitled cause, and in answer to the plaintiffs' Complaint in the above entitled cause, says:

1

Answering paragraph 1 of the plaintiffs' Complaint, this defendant neither admits nor denies the allegations therein contained, having insufficient information upon which to form a belief as to the truth of such averments and, therefore, leaves the plaintiffs to their proof.

2

Answering paragraph 2 of the plaintiffs' Complaint, this defendant admits the allegations therein contained.

3

Answering paragraph 3 of the plaintiffs' Complaint, this defendant admits the allegations therein contained.

[fol. 21] 4

Answering paragraph 4 of the plaintiffs' Complaint, this defendant admits that on or prior to February 12, 1936, he filed an application with the Interstate Commerce Commission for authority under the so-called "grandfather clause" of Section 206(a) of the Motor Carrier Act, 1935 (49 U. S. C. 306(a)), reading substantially in the language set forth in paragraph 4 of plaintiffs' Complaint, to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chasses, unfinished automobiles and all other automotive vehicles over irregular routes, but this defendant denies that the designation of the territory requested in said application is correctly set forth in paragraph 4 of the plaintiffs' Complaint and in support of such denial alleges the fact to be that authority was sought

by the applicant in such application to serve all points and places in the states of Michigan, Tennessee, Georgia, Alabama, Texas, Oregon, Kentucky, North Carolina, South Carolina, Arkansas, Washington, California passing through but not serving the states of Idaho, Nebraska, Colorado, Wyoming, Oklahoma, Illinois, Ohio, Utah, Nevada, Iowa, Kansas, Missouri, Indiana, Virginia.

5

Answering paragraph 5 of the plaintiffs' Complaint, this defendant admits that some of the named plaintiffs and others intervened in opposition to the granting of such application and appeared at and participated as protestants in the hearing of said application before the examiner to whom said application was referred for hearing, but this defendant neither admits nor denies that all of the plaintiffs herein so appeared in intervention or in opposition, having [fol. 22] insufficient information upon which to form a belief by reason of the fact that the record made at said hearing does not disclose with particularity the individual identity of some of the rail carriers for whom an appearance was entered and, therefore, leaves the plaintiffs to their proof.

6

Answering paragraph 6 of the plaintiffs' Complaint, this defendant admits the allegations therein contained.

7

Answering paragraph 7 of the plaintiffs' Complaint, this defendant denies that the plaintiffs are prejudiced and injured by said report and order of the Interstate Commerce Commission, and in support of such denial alleges the fact to be that said report and order merely confirmed operating authority already granted to this defendant under the terms and provisions of the Motor Carrier Act, 1935, and merely ratified operations then being conducted by this defendant, which operations had been instituted many years before and had been continuously conducted thereafter. As to the remaining allegations contained in paragraph 7 of the plaintiffs' Complaint, this defendant neither admits nor denies the same, having insufficient information upon which to form a belief as to the truth of such averments and, therefore, leaves the plaintiffs to their proof.

8

Answering paragraph 8 of the plaintiffs' Complaint, this defendant denies each and every allegation therein contained to the same effect as if each allegation was separately denied, and in support of such denial alleges the fact to be:

(a) That the evidence before the Commission did show that this defendant was engaged on June 1, 1935, and had been so engaged since that time to the date of hearing in bona fide operation as a common carrier by motor vehicle [fol. 23] in driveaway service of the commodities indicated, to all points located within the therein designated territory, within the meaning of the terms and provisions of the Motor Carrier Act, 1935.

(b) That the evidence shows that this defendant, during the period indicated, was engaged in the operations therein described from Detroit, Michigan, to many points other than those designated in paragraph 8, sub-paragraph (b), of the plaintiffs' Complaint.

(c) That the evidence shows that this defendant was engaged in such transportation service between Detroit, Michigan, and more than two points in all of the states above designated within the meaning and terms and provisions of the Motor Carrier Act, 1935.

(d) That the finding by the Commission and the evidence presented fully supports the grant of authority as contained in said order.

(e) That the Commission's holding was proper under the terms and provisions of the Motor Carrier Act, 1935.

(f) That the evidence supports the finding that this defendant was engaged in service to the State of Oregon as a common carrier rather than as a contract carrier.

(g) That the evidence of record indicates that this defendant made every effort to comply with any and all requirements made upon him by the states therein designated.

(h) That the evidence of record clearly indicates that the operations conducted by this defendant, by their inherent nature, required operations over irregular routes.

(i) That the evidence of record indicates that this defendant made every effort to comply with all requirements made of him by the states through which he operated and does [fol. 24] not indicate a failure by this defendant to comply with such regulations.

9

Answering paragraph 9 of the plaintiffs' Complaint, this defendant denies the allegations therein contained and in support of such denial alleges the fact to be that this defendant assumed the burden of proving and did prove that he was complying with the laws of the states through which his operations were conducted thereby removing the necessity for any such ruling.

10

Answering paragraph 10 of the plaintiffs' Complaint, this defendant denies the allegations therein contained and in support of such denial alleges the fact to be that the official record of proceedings taken at said hearing will show that counsel for this defendant made an offer to furnish additional information following the hearing; that the examiner made a ruling that such information could be furnished if satisfactory; and that counsel for railroad protestants stated that this arrangement would be satisfactory.

11

Furthe answering the plaintiffs' Complaint, this defendant moves this Honorable Court to dismiss the plaintiffs' Complaint for and upon the following assigned grounds and reasons:

(1) Because the plaintiffs' Complaint does not state a cause of action.

(2) Because the plaintiffs' Complaint does not show, upon its face, grounds for the relief therein sought.

(3) Because the plaintiffs herein are not proper parties in interest to the proceedings under attack in the plaintiffs' Complaint.

(4) Because the plaintiffs herein are in no way prejudiced or damaged by the entry of the Interstate Commerce Com- [fol. 25] mission order under attack in the Complaint.

Wherefore, this defendant prays: That an Order may be entered by this Honorable Court dismissing the plaintiffs'

Complaint herein and granting to this defendant all other relief to which he may be deemed entitled, and granting to this defendant all costs incurred in his defense of this action.

(Signed) John P. Fleming. So Impleaded as one of the defendants.

Carney D. Matheson, George S. Dixon, Edmund M. Brady, Attorneys for defendant,

John P. Fleming, 2280 Penobscot Bldg., Detroit, Michigan. Telephone No. RA-8590.

Dated: Detroit, Michigan, August 4th, 1939.

Duly sworn to by George S. Dixon. Jurat omitted in printing.

[fol. 26] To Mr. Henry P. Stacy, Attorney for Plaintiffs, 314 Michigan Central Terminal Bldg., Detroit, Michigan:

Please take notice that the Motion set forth in paragraph 11 of the Answer of the Defendant, John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, will be brought on for hearing at the trial of this cause on its merits, or at such prior time as the court may, in its discretion, order, or at such time as any of the parties hereto may, by proper notice under the rules and practice of this court, direct.

(Signed) George S. Dixon, Attorney for John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service.

Dated: Detroit, Michigan, August 4, 1939.

[fol. 27] In the District Court of the United States

[Title omitted]

Answer of the United States—Filed Aug. 11, 1939

First Defense

Defendant, United States of America, for its First Defense to the complaint says:

I

No one of the plaintiffs hereto has any legal interest which is affected or violated by the orders of the Interstate

Commerce Commission complained of by the bill, and hence no one of them has any standing to maintain this action.

II

The bill fails to show or allege that any one of the plaintiffs has any property or other legal right which is or will be affected by the said orders of the Interstate Commerce Commission.

III

The said orders of the Commission are not directed against the plaintiffs or any one of them and make no requirements whatever of the plaintiffs or any one of them.

[fol. 28] IV

The bill of complaint fails to allege facts showing that the said orders in any way prejudice or damage said plaintiffs or any one of them.

V

The bill of complaint wholly fails to allege facts sufficient to constitute a cause of action against the United States wherefor- this defendant moves that the bill of complaint be dismissed and prays that an order be entered accordingly.

Second Defense

This defendant for its Second Defense to the bill of complaint says:

I

Defendant admits the allegations of paragraphs 1, 2, 3, and 6 of the bill of complaint; and denies each and every allegation of paragraphs 8, 9, and 10 of the complaint.

II

Answering paragraph 4, defendant admits that John P. Fleming, doing business as John P. Fleming Driveaway Service, filed an application with the Interstate Commerce Commission on February 12, 1936, under the so-called

"Grandfather Clause" of section 206(a) of the Motor Carrier Act of 1935 (49 U. S. C. 306(a)), but denies that the allegations of paragraph 4 sufficiently or accurately describe such application, and for a further and accurate description thereof this defendant respectfully refers the Court to the description of such application in the report of the Interstate Commerce Commission attached as Exhibit A to the bill of complaint and to the original application made a part of the record before the Interstate Commerce Commission.

[fol. 29] III

Answering paragraph 5, defendant admits that some of the named plaintiffs and others intervened in opposition to the granting of such application and appeared at and participated as protestants in the hearing of said application, but this defendant neither admits nor denies that all the plaintiffs herein so appeared in intervention or in opposition, having insufficient information upon which to form a belief by reason of the fact that the record made at said hearing does not disclose with particularity the individual identity of some of the rail carriers for whom an appearance was entered.

IV

Answering paragraph 7, defendant denies that the plaintiffs or any of them are prejudiced or injured by the report and order of the Interstate Commerce Commission. Defendant neither admits nor denies the remaining allegations of paragraph 7, having insufficient information upon which to form a belief as to the truth of such averments.

V

Further answering paragraphs 4, 5, 6, 7, 8, 9, and 10, defendant admits and alleges that pursuant to the application filed with it by John P. Fleming, doing business as John P. Fleming Driveaway Service, as aforesaid, the the Commission set the matter down for hearing before an examiner under the title "Docket No. MC-48654, John P. Fleming, Common Carrier Application"; that in said proceeding the parties thereto, including such of the plaintiffs as intervened therein, were accorded a full hearing; that in such hearing a large volume of testimony and other

evidence bearing upon the matters put in issue by the said application were submitted to the Commission for consideration; that at said hearing and subsequently, by exceptions filed to the recommended order of the examiner, and [fol. 30] briefs in respect to the same, questions relating to said issues were fully presented to the Commission for determination on behalf of the parties by their respective counsel, whereupon the Commission determined said issues and entered and duly served upon the parties to said proceeding its report and order of September 19, 1938, copies of which are annexed as Exhibits A and B, respectively, to the bill of complaint; that thereafter plaintiffs filed a petition for reargument and reconsideration by the full Commission of the said report and order and that on December 5, 1938, the Commission denied said petition; that thereafter plaintiffs filed a supplemental petition for reargument and reconsideration by the full Commission of said report and order and said supplemental petition was denied by the Commission on March 6, 1939. The defendant further alleges that findings and conclusions of the Commission in said report were fully supported and justified by the evidence submitted in said proceeding as aforesaid; that in making said report and order the Commission considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance, and consideration called to its attention on behalf of parties to said proceeding, including the matters covered by the complaint herein. Defendant further alleges that the said orders of September 19, 1938, December 5, 1938, and March 6, 1939, were not made or entered either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support them; that in making said orders the Commission did not exceed its authority nor violate any legal or constitutional right of the plaintiffs and defendant denies each and every allegation to the contrary contained in said complaint. Insofar as the allegations of the bill of complaint are consistent with, and are disclosed by, the record before the Commission and its report and order, they are admitted; insofar as they are inconsistent therewith and are undisclosed thereby they are denied.

[fol. 31] VI

Except as herein above expressly admitted, defendant denies the truth of each and every allegation contained

in the complaint insofar as they conflict either with the allegations herein or with the statements or conclusions set out in the Commission's said report of September 19, 1938.

Frank Coleman, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.
Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.
John C. Lehr, by J. Thomas Simms, United States Attorney, Detroit, Michigan.
Thurman Arnold, Assistant Attorney General.

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANT INTERSTATE COMMERCE COMMISSION—Filed Aug. 24, 1939

The Interstate Commerce Commission, defendant in the above-entitled cause, hereinafter designated the Commission, for its answer to the complaint herein, says:

I

Answering paragraphs 1 to 7, inclusive, of the complaint, the Commission, for the purposes of this suit and for none other, admits that the allegations in said paragraphs are true, except (a) that the Commission denies that the allegations of paragraph 4 of the complaint relative to the substance and effect of the application made to the Commission by defendant Fleming on February 12, 1936, constitute a [fol. 33] full, true or correct statement as to said application, and the Commission respectfully refers the Court to the second paragraph of its report of September 19, 1938, Exhibit A to the complaint herein, for such information, and (b) that the Commission denies the allegation of paragraph 7 of the complaint relative to prejudice and injury to plaintiffs, and denies that any legal damage will result to plaintiffs because of the Commission's report and order.

II

Answering paragraphs 8 to 10, inclusive, of the complaint, the Commission admits and alleges that it made its report and order of September 19, 1938, true copies of which are attached as Exhibits A and B to the complaint herein, in a proceeding pending before it entitled No. MC

48654, *John P. Fleming Common Carrier Application.* The Commission further alleges that in said proceeding the parties thereto, including certain of the plaintiffs herein, appeared and were accorded the full hearing provided for in and by the statutes applicable thereto; that in said hearing a large volume of testimony and other evidence bearing upon the matters in issue was submitted to the Commission for consideration, and that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to the matters in issue were fully argued and submitted to the Commission for determination on behalf of said parties, including some of the plaintiffs herein, whereupon the Commission determined the questions in issue and entered and duly served upon all parties to the proceeding and other interested parties, its said report and order; that said report and order included the Commission's findings, decision, conclusions, order and [fol. 34] requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order are based.

The Commission further alleges that said findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by law and by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges and states that in making said report and order it considered and weighed carefully, in the light of its knowledge and experience, each fact, circumstance and condition presented by said evidence and by the arguments and briefs of all the parties to said proceeding, including such parties thereto as are plaintiffs herein.

The Commission further alleges that said order was not made or entered either arbitrarily or unjustly or contrary to the law or to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in said complaint.

III

Further answering said complaint, the Commission specifically denies that unless its said order is set aside plaintiffs will suffer loss or damage.

Except as herein expressly admitted the Commission denies the truth of each of and all the allegations contained in the complaint.

[fol. 35] Wherefore, having fully answered, the Commission prays that the complaint be dismissed.

Interstate Commerce Commission, By Nelson Thomas, Attorney, 3328 Interstate Commerce Bldg., Washington, D. C., J. Stanley Payne, Acting Chief Counsel, of Counsel.

[fol. 36] City of Washington,
District of Columbia, ss:

John L. Rogers, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, defendant in the above-entitled cause, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

John L. Rogers.

Subscribed and sworn to before the undersigned, a Notary Public in and for the District of Columbia, this 21st day of August, 1939. J. Forney Donaldson, Notary Public. My commission expires Sept. 14, 1943.

[fol. 37] In the District Court of the United States

[Title omitted]

Amendment to Answer of Defendant Interstate Commerce Commission—Filed January 31, 1941

Comes now the Interstate Commerce Commission and, leave of Court having been granted therefor, hereby amends its answer heretofore filed by adding at the bottom of page 3 of said answer the following:

"IV

"Further answering the complaint the Commission alleges and states that no one of the plaintiffs herein has any legal right or interest which is or would be affected, violated or of which a plaintiff would be deprived by the

order of the Interstate Commerce Commission complained of and hence neither the plaintiffs nor any one of them has any standing to institute or maintain this suit."

Interstate Commerce Commission, By Nelson Thomas, Attorney.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 38] In the District Court of the United States

[Title omitted]

Opinion—Rendered and Filed January 31, 1941

Before Simons, Circuit Judge, Moinet and Picard, District Judges.

Simons, Circuit Judge. The Petition seeks to enjoin and annul an order of the Interstate Commerce Commission granting to the defendant Fleming a certificate of public convenience and necessity under the so-called "Grandfather" clause of the Motor Carrier Act of 1935, Sec. 206a, 49 U. S. C. A. 306a (now Part II of the Interstate Commerce Act). The cause came on to be heard before a specially constituted District Court of three judges, convened in pursuance of Sec. 47, Title 28 U. S. C. A., and, as stipulated, the hearing was both preliminary and final upon the merits of the petition.

The plaintiffs are railroads engaged in interstate commerce, four of them having been interveners and protestants before the Commission. The defendants are Fleming, individually and under his assumed firm name, the Commission, and the United States. The order sought to be enjoined was entered on September 19, 1938, upon an application filed February 12, 1936, which was approved in part and in part denied, effective as of October 26, 1938. The Commission found that the applicant was engaged on June 1, 1935, and since that time, in bona fide operation as a common carrier by motor vehicle in drive-away service of new automotive vehicles, finished and unfinished, and new automotive vehicles chassis in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky,

North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, and over irregular routes through Idaho, Illinois, Indiana, Iowa, Kansas, Nevada, Nebraska, Ohio, [fol. 39] Oklahoma, Utah, Virginia, and Wyoming; that he was entitled to a certificate of public convenience and necessity authorized the continuance of this operation, and as incident thereto, to transport rejected vehicles or chassis from any point in the states to which service is authorized, back to Detroit.

It is stipulated that the plaintiff railroads are engaged in transporting automotive vehicles and chassis to points in the states named, and the plaintiffs base their right to contest the validity of the order upon this competitive situation, asserting that it gives them the status of parties in interest under the provisions of Sec. 205h of the Motor Carrier Act (now 205g of Part II), which recites, "any final order made under this Part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission under Part I * * *". They also justify their status as plaintiffs entitled to maintain the action by reason of the appearance of some as interveners in the proceeding before the Commission upon the authority of *Edward Hines, Trustee*, v. *U. S.*, 263 U. S., 132; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42.

The defendants deny that any of the plaintiffs are entitled to maintain this action, either by reason of their appearance in the proceeding before the Commission, or independently of that fact, and move to dismiss. Their motion must be overruled. The phrase "party in interest", as used in the Transportation Act, has been before the court upon numerous occasions, the latest discussion being that in *L. Singer & Sons, et al* v. *Union Pacific RR Co.*, —— U. S., ——, decided December 16, 1930. In that case, the plaintiff industry, and in its companion case, *Kansas City, Mo.* v. *L. Singer & Sons, et al.*, idem, the plaintiff municipality, were denied the right to contest an order of the Commission because such suits cannot be instituted by an individual unless he has some special and peculiar interest which may directly and materially be affected by alleged unlawful action. He must possess something more than a common concern for obedience to law. Absent such special and peculiar interest, he must, in common with the public interest, find his protection in the permission to sue

granted to public authorities. If, however, special circumstances are shown, then he is a party in interest within the meaning of the statute, the court giving approval to [fol. 40] the decision of this court to that effect in *Detroit & M. Ry.* v. *Boyne City,* 286 Fed., 540.

The complaining railroads and the defendant Fleming are equally engaged in the transportation of automotive vehicles from Detroit to the authorized destinations, and so within the rationale of the cases distinguished in the Singer decision, *Texas & Pacific RR Co.* v. *Gulf Colorado & Santa Fe RR. Co.,* 270 U. S. 266; *West Pacific California RR Co.* v. *Southern Pacific,* 284 U. S., 47, we conclude that they are possessed of that special and peculiar interest in the enforcement of the challenged order that gives to them the status of plaintiffs within the meaning of the statute. This being so, we need not inquire whether their right to maintain the action is also supported by the fact that some of them appeared as parties in the proceeding before the Commission.

Section 206a of the Motor Carrier Act, provides, except as elsewhere authorized, that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway • • • unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." The proviso in the Section referred to as the "Grandfather" clause, declares that if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made", and "has so operated since that time, except • • • as to interruptions of service over which the applicant had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation". Pending determination of the application the applicant is authorized to continue operations. Section 208a provides that the certificate issued under Sec. 206a shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate".

The plaintiffs assail the order of the Commission as not being supported by substantial evidence of actual operation in much of the territory granted, on the ground that Flem-

ing's deliveries were, in many of the states, negligible and [fol. 41] intermittent, so as not to qualify him for a certificate under the "Grandfather" clause. They also complain that the Commission misconstrued the statute by interpreting "territory" as synonymous with "state", and so exceeded its authority in granting rights for operation to all points in a number of the states when the proofs showed that deliveries had been made but to one or to several points of destination in such states. Finally, they challenge the finding that Fleming was in "bona fide" operation in all of the territory, on the ground that in a number of the authorized states he had not fully complied with state law governing the operation of motor carriers within or through such states.

The Commission found (MC 48654) that Fleming had commenced operations during the early part of 1933, from which time to July, 1936, he had transported or participated in the transportation of more than 2100 vehicles, the shipments consisting of from 1 to 16 vehicles, although shipments of 2 and 4 vehicles exceeded shipments of other quantities; that he had also transported used cars between various points in the states covered by his application, and had returned certain new cars, refused by the distributor or dealer, to Detroit, as a necessary incident to his business. In each of the states, save one, in which deliveries are authorized by the order, there had been shipments prior to the crucial date, June 1, 1935, and shipments thereafter prior to the date of the hearing. As to many of the states, the applicant had transported numerous shipments to the points served.

The statute is silent upon the degree of operation necessary to qualify the applicant for a certificate, under the "Grandfather" clause. Subject to the condition that the operation must be bona fide, hereinafter discussed, decision upon the substantial character of the applicant's business must be considered as having been committed to the judgment of the administrative agency entrusted by the Act with regulation and enforcement. The Commission found that Fleming was engaged in a highly specialized transportation service with few direct competitors, and that but 7% of all new automobiles sold in 24 western states were being transported by the method in which the applicant was engaged. In our application of the now familiar rules governing review of factual findings by administrative bodies, we are

unable to say that the findings of the Commission are un-
[fol. 42] supported by substantial evidence, and in this respect they will be sustained, except as to operation in the State of Arkansas. The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that state his operations had been abandoned. *U. S.* v. *Maher*, 307 U. S. 148.

As a basis for granting to Fleming authority to serve all points in a state, though actual operation during the critical period had been but to a limited number of distribution points in such state, the Commission relied upon evidence showing that distribution points are constantly being shifted from the standpoint of a state-wide area; that dealers accounts are frequently changed, and that sales volume at given points may show rapid increases or decreases. The result of a shift in distribution point would leave the applicant without authority to serve an account theretofore served, and render the carrier unable to continue an operation which he had been conducting. It took into consideration the nature and characteristics of this transportation service as highly specialized, the type of operation engaged in, the infrequency of the demands of consignees, and concluded that the record was convincing that the applicant's operations had been and would continue to be irregular in nature because of the conditions under which he might secure traffic, and that the same proof, with respect to territory served, that might be required of a general commodity hauler, could not be imposed upon him, nor could his operations be confined within the same definite limits.

The statute neither expressly nor by implication gives connotation to the phrase "within the territory". No standard is found whereby the area is to be delimited, and the plaintiffs had been unable to suggest criteria by which the Commission must be governed. It is general knowledge that in many industries distribution points are determined for areas coextensive with state boundaries. The Commission had made exhaustive studies of motor carrier transportation services and it must be assumed it has become expert in that field. We find no error in its findings in this respect.

The plaintiffs contend that Fleming's operations were not "bona fide" in character because he had failed to secure certificates from each of the states through or into which he conducted operations. Fleming had, however, [fol. 43] made inquiry as to certificate requirements, some of which were still pending at the time of the hearing. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas, were introduced, and the proofs showed that he held permits issued by the States of Oregon and Nebraska. In a few of the states, notably Missouri, there may have been temporary, inadvertent, or purely technical operation without sanction of local law. The Commission found, notwithstanding, that he had been engaged on June 1, 1935, and since, in bona fide operation within or through each of the states authorized.

This finding is attacked upon the authority of *McDonald* v. *Thompson*, 305 U. S., 263. While that case had not been decided when the findings of the Commission were made and its order entered, it was made the basis of a petition for rehearing before the Commission, which was denied. McDonald v. Thompson holds that the expression "in bona fide operation" suggests "absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire". It then reaches the conclusion that, "plainly the proviso does not extend to one operating as a common carrier on the public highways of the state in defiance of its laws".

In McDonald v. Thompson the Supreme Court was not called upon to set aside a finding of the Interstate Commerce Commission, that the applicant for a certificate of convenience and necessity had been in bona fide operation before and since the critical date, nor to determine whether the finding of the Commission had been based upon substantial evidence. That such finding is one of fact is indicated by the language of the court in *U. S.* v. *Maher*, supra, "Whether an applicant seeking exemption had, in fact, been in operation within the immunizing period of the statute, was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission." Granted that the interpretation of the phrase "in

bona fide operation' 's a question of law, we find nothing in McDonald v. Thon pson to indicate that an applicant, who inadvertently or t mporarily made deliveries into or operated through a state without its express authority having previously been granted, is operating as a common [fol. 44] carrier on its public highways in defiance of its laws, when the state itself had not sought to exclude such carrier. McDonald had been refused the use of the highways of Texas by its Railroad Commission and its courts, but denied that Texas law applied, and set up as authority his application, under the Motor Carrier Act, and the provision therein that, pending acting upon the application, his operations might proceed. Fleming's operations were in recognition of state law, and his applications to state authority and his inquiries as to the requirements of the several states were obviously so considered by the Commission. In any event there is no evidence that his inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority.

The Commission had in mind the confusion that existed with respect to the requirements imposed by the laws of the various states, and the regulations of its public Commissions. It concluded, with reference to the Missouri situation, "compliance by applicant with the applicable laws of Missouri is a matter that rests between applic nt and the state authorities". Another consideration seems also important. Where Fleming had been operating with the express or implied consent of state officials while endeavoring to ascertain the formalities to be observed to secure a permit, the present denial of a certificate, by the Commission, to operate in such states under the "Grandfather" clause, would, if, thereafter, he satisfied state authority for necessary local authorization, be conclusive. As we read it, nothing in McDonald v. Thompson compels the conclusion that a finding by the Commission of bona fide operation must be set aside when such finding is based upon substantial evidence and there is no proof of the defiance of local law.

The order of the Commission will be modified by excluding from the certificate authorized thereby, authority to operate to the State of Arkansas, and as so modified the order of the Commission is sustained. The findings of the Commission and its conclusions of law, insofar as they

bear upon issues herein discussed, are adopted as the findings and conclusions of the court, except as modified.

Charles C. Simons, United States Circuit Judge.
Edward J. Moinet, United States District Judge.
Frank A. Picard, United States District Judge.

Jan. 31, 1941.

[fol. 45] IN THE DISTRICT COURT OF THE UNITED STATES

Civil Action No. 1323

THE ALTON RAILROAD COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and JOHN P. FLEMING, an individual doing business as John P. Fleming Driveaway Service, Defendants

JUDGMENT AND DECREE—April 7, 1941

This cause came on to be heard before a specially constituted District Court of three judges, convened pursuant to Section 47, Title 28, U. S. C. A., on the 26th day of November, 1940, for both preliminary and final hearings; and upon due consideration thereof,

It is now ordered, adjudged and decreed:

1. The Report and Order of the Interstate Commerce Commission in John P. Fleming Common Carrier Application No. MC-48654, dated September 19, 1938, said Report being reported in 8 Motor Carrier Cases 469, is modified, and annulled in part, to the extent of excluding therefrom the authority therein granted to transport property from Detroit, Michigan, on the one hand, to any point in the State of Arkansas, on the other hand; and the defendant, John P. Fleming, is permanently enjoined from so operating under the authority of said Report and Order. In all other respects said Report and Order are sustained and the relief asked in plaintiffs' complaint is denied.

[fol. 46] 2. Costs are taxed to plaintiffs, except compensation of the court reporter and cost of furnishing

reporter's transcript, which costs have been paid by agreement of parties.

Plaintiffs and all defendants are duly allowed exceptions.

Done and ordered this 7th day of ~~March,~~ April, 1941.

Charles C. Simons, United States Circuit Judge.
Edward J. Moinet, United States District Judge.
Frank A. Picard, United States District Judge.

Approved as to form:

Amos M. Mathews, Attorney for all plaintiffs. Frank Coleman, Special Assistant to the Attorney General, attorney for defendant United States of America. Nelson Thomas, Attorney for defendant Interstate Commerce Commission. George S. Dixon, Attorney for defendant John P. Fleming, an individual doing business as John P. Fleming Driveaway Service.

[fol. 47] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFFS' ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed April 21, 1941

For their assignment of errors plaintiffs, appellants, say the District Court erred in entering its opinion, findings, and judgment and decree in this action, in the following respects:

1

In holding that there was sufficient evidence before the Interstate Commerce Commission to sustain its report and order, and its findings therein, that defendant, appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service;

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes

through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming;

[fol. 48] (b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

2

In holding that the Interstate Commerce Commission construed correctly the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act) including the following phrase in Section 206 (a), 49 U. S. C. A. 306 (a):

"• • • in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time • • •,"

and in holding that the Commission correctly decided in its construction of said Act that appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service:

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand;

[fol. 49] (b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

3

In sustaining the conclusion of the Interstate Commerce Commission that because (8 M. C. C. p. 472):

"Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in * * * Alabama; shipments to two points in each of the States of California * * * and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia,"

the said defendant, appellee, John P. Fleming, was on June 1, 1935, in bona fide operation as a common carrier by motor vehicle from Detroit, Michigan, to all points in said states.

4

In sustaining the findings and conclusions of the Interstate Commerce Commission that transportation by the said [fol. 50] defendant, appellee, John P. Fleming, of the few automotive vehicles shown by the evidence to have been transported by him, on a few occasions to a few points in Washington, Oregon, California, and Texas, constituted bona fide operation as a common carrier by motor vehicle either on or after June 1, 1935, to any points in said states.

5

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was operating only as a contract carrier by motor vehicle on June 1, 1935, in Oregon, and has so operated there since that time, and therefore was not then and there operating as a common carrier by motor vehicle.

6

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was not in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and since that time, in, or upon the highways of Oregon, Nebraska, Missouri, Texas, and Ohio, because he was during such time operating upon the public highways of such states in vio-

lation of their laws regulating and taxing the operations of motor vehicles upon such highways.

7

In failing to hold that if said appellee, Fleming, was in operation on June 1, 1935, and since that time, in any territory within which is included, either as the whole or a part [fol. 51] thereof, Oregon, Texas, Nebraska, Missouri, or Ohio, said appellee was not in bona fide operation within said territory because he was operating in violation of the laws of said states.

8

In adopting as its own, except to the extent modified in the opinion and decree, the findings of fact of the Interstate Commerce Commission.

9

In adopting as its own, except to the extent modified in the opinion and decree, the conclusions of law of the Interstate Commerce Commission.

10

Insofar as it held that the question, whether violation of state laws by a motor carrier constitutes lack of bona fide operation, is a question of fact for the determination of the Interstate Commerce Commission.

11

In holding, either as a finding of fact or as a conclusion of law, or both, that any violations of state laws by appellee Fleming were temporary, inadvertent, or technical; and in failing to hold that such violations were intentional.

12

In finding that four of the plaintiffs were interveners and protestants before the Interstate Commerce Commis- [fols. 52-55] sion, whereas the undisputed evidence shows that *all except four* of the plaintiffs were interveners and protestants before the Commission. (It is believed that the Court's statement and finding here excepted to is an inadvertence.)

Wherefore, plaintiffs, appellants, pray that as much of the final decree of the District Court as denies any relief asked by plaintiffs be reversed, and that the plaintiffs have all of the relief prayed in their complaint.

Amos M. Mathews, Henry P. Stacy, Frederick V. Slocum, Attorneys for Plaintiffs, Appellants.

[fol. 56] In United States District Court

[Title omitted]

Plaintiffs' Petition for Allowance of Appeal—Filed April 21, 1941

To the Honorable Charles C. Simons, United States Circuit Judge; The Honorable Edward J. Moinet, United States District Judge; and The Honorable Frank A. Picard, United States District Judge:

The above named plaintiffs, being all of the plaintiffs in this cause, respectfully state:

Believing the final decree of the Court, and the opinion, findings and conclusions of the Court upon which said decree is based, to be erroneous, except insofar as said decree grants a part of the relief asked by plaintiffs, the plaintiffs pray for the allowance of an appeal from said final decree, insofar as said decree denies any relief asked by plaintiffs, to the Supreme Court of the United States.

The errors upon which plaintiffs claim to be entitled to an appeal are more fully set out in the Assignment of Errors and Prayer for Reversal filed in the office of the Clerk of this Court and presented herewith.

Plaintiffs have also filed in the Clerk's office, and present herewith, a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the Supreme Court.

Respectfully submitted, Amos M. Mathews, Henry P. Stacy, Frederick V. Slocum, Attorneys for Plaintiffs, Appellants.

[fol. 57] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING PLAINTIFFS' APPEAL—April 21, 1941

The plaintiffs having presented to the Court their petition for appeal to the Supreme Court of the United States from the final decree of the Court, said petition being accompanied by an Assignment of Errors and a Statement as to Jurisdiction of the Supreme court, and said papers and the record herein having been considered,

It Is Now Ordered By the Court:

The plaintiffs are allowed an appeal to the Supreme Court of the United States from as much of the final decree of this Court as denies any relief asked by plaintiffs.

Plaintiffs shall file security for costs in the penal sum of $250.00.

Done and ordered this 21st day of April, 1941.

Charles C. Simons, United States Circuit Judge. Edward J. Moinet, United States District Judge. Frank A. Picard, United States District Judge.

[fols. 58-59] Citation in usual form showing service on the United States of America, Interstate Commerce Commission and John P. Fleming, omitted in printing.

[fols. 60-61] Cost Bond on appeal for $250 approved and filed April 21, 1941. Omitted in printing.

[fol. 62] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Statement of the Evidence—Filed April 28, 1941

This cause came on for hearing on the 26th day of November, 1940, at Detroit, Michigan, before the Hon. Charles C. Simons, United States Circuit Judge, and the Hon. Edward J. Moinet and Frank A. Picard, United States

District Judges, sitting as a three-judge court pursuant to Section 47, Title 28, U. S. C. A.

Appearing for the plaintiffs were Amos M. Mathews, Henry P. Stacy, and Frederick V. Slocum; for the defendant, United States of America, Frank Coleman, Special Assistant to the Attorney General; for the defendant, Interstate Commerce Commission Nelson Thomas; for the defendant, John P. Fleming, an individual doing business as John P. Fleming Driveaway Service, Carney D. Matheson and George S. Dixon.

Stipulation

It was stipulated that the hearing should be both a preliminary and a final hearing of the cause.

Amendments to Pleadings

The amendment to the answer of defendant, Interstate Commerce Commission, was allowed and ordered filed. Plaintiffs, with leave of Court, amended their complaint by striking therefrom paragraph 10 and sub-paragraph (h) of paragraph 8.

[fol. 63] Plaintiffs' Evidence

Plaintiffs' exhibits numbered, respectively, 1, 2, 3, 4, and 5, were received in evidence. Exhibits 1, 2, 3, and 4, comprise a transcript, certified by the Secretary of the Interstate Commerce Commission, and under the Commission's seal, of the entire record of the proceedings before the Commission described in plaintiffs' Complaint. Exhibit No. 5 is a stipulation in writing, agreed to and signed by all parties.

The aforesaid five exhibits constitute all of the evidence offered or received at the trial before the District Court. The following is a true abstract of all of the material parts of said exhibits, prepared pursuant to the provisions of paragraph 2 of Rule 8, and paragraph 2 of Rule 10 of the Rules of the Supreme Court. Wherever in the following the words "District Court (or D. C.) exhibits" or "plaintiffs' exhibits" appear, they refer to exhibits introduced by plaintiffs at the hearing in the District Court. Wherever in the following the words "applicant's exhibits" appear,

they refer to exhibits introduced at the hearing before the Interstate Commerce Commission examiner by the applicant there, John P. Fleming, etc.

[fol. 64] PLAINTIFF'S EXHIBIT NO. 1

Form B. M. C. 1.

PROPERTY CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form for use only by Common Carriers engaged in transportation of property in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter.)

(Before answering, read General Instructions on last page. Numbers under line refer to Special Instructions on that page.)

Before the Interstate Commerce Commission

Docket No. 48654

Application of John P. Fleming Driveaway Service (Full and correct name) for a Certificate (Certificate or permit) to operate as a common carrier (limited) (Common carrier or contract carrier) of property, under the Motor Carrier Act, 1935.

Application

To the Interstate Commerce Commission, Washington, D. C.

Applicant States:

That full and correct name of applicant is John P. Fleming Driveaway Service.

Business address 12801 Kercheval Avenue, (Street and number), Detroit (City), Wayne (County), Michigan (State).

That applicant is an individual, doing business under

(1)

the trade name or style of John P. Fleming Driveaway Service.

That the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on June 1, 1935, were as shown in Exhibit A, and that no (2)
change has occurred therein since that date, except as shown in that exhibit.

[fol. 65] That applicant submits as evidence in support of statements contained in Exhibit A, the information contained in Exhibit B.

That applicant will submit such additional information to substantiate the applicant's prayer herein as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of application on interested parties as shown in Exhibit C.

Wherefore, The applicant herein prays: That the Commission issue a Certificate (Certificate or permit) to operate as a common carrier (limited) (Common or Contract Carrier) of automobiles, trucks, chasses, unfinished automobiles and all (State whether commodities generally, with certain exceptions, or special commodities only) other automotive vehicles only, and applicant further prays that if the facts herein contained show that applicant, although applying for a certificate (Certificate) (Permit) is entitled to a permit (Permit) (Certificate), this application be considered to be one for the appropriate form of authority.

Dated this 5 day of February, 1936.

John P. Fleming Driveaway Service, (Applicant),
(Signed) By John P. Fleming (Title) Owner.

Oath

STATE OF MICHIGAN,
County of Wayne, ss:

John P. Fleming (Name of affiant) makes oath and says that he is the owner (Title of affiant) of the John P. Fleming Driveaway Service; that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits at-
[fol. 66] tached thereto and made a part thereof; that he has knowiedge of the matters set forth therein and that all

such statements and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

(Signed) John P. Fleming.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 5 day of February, 1936. (Signed) George S. Dixon. (Seal.)

EXHIBIT A

John P. Fleming Driveaway Service
(Name of Applicant)

Except as otherwise noted, the following information is to be as of June 1, 1935, if application is for a Certificate; and as of July 1, 1935, if application is for a Permit. However, this instruction is not intended to confine all answers of applicant strictly to such dates. The information given should, where necessary, cover a sufficient period prior to such dates to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the Certificate or Permit sought under the "Grandfather" clause.

Type of Service and Routes and Territory Served

I. Type of service:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce, property, consisting of (1) ~~commodities generally except, (Indicate exceptions, either specifically or by their general nature)~~ or

(2) special commodities See statement No. 1, Exhibit "A" (Indicate class or classes of commodities transported) (Strike out (1) or (2), whichever is inapplicable to applicant's business).

[fol. 67] B. Applicant (or predecessor) undertook to transport property for the general public for hire Yes. (Yes)

C. Applicant has continued to operate as above stated without any change in the type or extent of service and is now so operating Yes (Yes) (No). If the answer is "No", state in detail character and extent of such changes.

D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons clearly and in detail. See statement No. 2, Exhibit "A".

II. Description of each route regularly operated on June 1, 1935:

(2)

See statement No. 3, Exhibit "A".

A. By applicant (or predecessor in interest) in own right:

Show also, for each route separately:

(1) Whether all intermediate points were served Yes (Yes) (No); if not, indicate exceptions:

(2) The off-route points served off-route points from all principal highways served. See statement No. 3, Exhibit
(4)
"A".

(3) Character of traffic (that is, commodities generally, with certain exceptions; special commodities, etc.) Automobiles, trucks, chasses, unfinished automobiles and all other automotive vehicles Only. (Specify exceptions, or special commodities).

(4) Frequency of service (where interval between schedules was more than a day) irregular

(5) Points at which traffic was interchanged, with whom interchanged, and the arrangement under which interchange was effected, including whether or not through rates were used No interchange of traffic.

[fol. 68] B. Has applicant acquired or instituted a route or routes since —— 1, 1935? (Yes) (No) If so, attach
(2)
statement designated as II-B), giving, for each such route, the information required in (A) above and named and address of predecessor, if any. Attach copy of purchase

agreement, State certificate or permit, or other documents evidencing acquisition or institution of each such route or routes. See statement No. 4, Exhibit "A".

C. Does applicant herein apply for rights over any route or routes operated by others under agreement? (Yes) (No) If so, attach statement (designated as II-C), giving, for each such route, the information requested in (A) above and name and address of operator. Attach copy of lease or operating agreement. See statement No. 4, Exhibit "A"

D. Does applicant operate over any route or routes under a lease or operating agreement? (Yes) (No) If so, attach statement (designated as II-D), giving, for each such route, the information requested in (A) above and name and address of the other party to such lease or agreement. Attach copy of such lease or agreement. See statement No. 4.

E. Has applicant abandoned or otherwise disposed of any route or routes since —— 1, 1935? (Yes) (No) If so,
(2)
attach statement (designated as II-E), giving, for each such route, the information requested in (A) above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal. See statement No. 4, Exhibit "A".

[fol. 69] F. Were operations on any of the above routes or parts of routes begun since January 1, 1935? (Yes) (No) If so, give the date on which operations commenced. See statement No. 4, Exhibit "A".

G. Were operations on any of the above routes or parts of routes seasonal? (Yes) (No) If so, attach statement (designated as II-G), giving the facts clearly and in detail, showing applicant's customary operation, including months of normal operating season. See statement No. 5, Exhibit "A".

III. Description of operations over irregular routes on
(2)
—— 1, 1935: See statement No. 6, Exhibit "A".

A. Location of applicant's headquarters 12801 Kercheval Avenue, Detroit, Michigan.

B. Where did applicant obtain the main volume of its traffic? If a place or places, name them; if a territory, describe it fully. See statement No. 7, Exhibit "A".

C. To what principal place, places or territory did applicant transport such traffic? Answer as in (B). See statement No. 8, Exhibit "A".

D. If answers to the above questions do not adequately and completely describe applicant's operations on —— 1, 1935, describe operations clearly and in detail. See statement No. 8, Exhibit "A".

E. Have there been any changes in the nature or extent of applicant's irregular route operation between —— 1, 1935, and date of this application? (Yes) (No) If so, describe the changes in detail. See statement No. 9, Exhibit "A".

IV. A. Number of vehicles in revenue service on June 1, (2)
1935: See statement No. 10, Exhibit "A".

[fol. 70] EXHIBIT "A"

Statement No. 1

I-A. (a) Special Commodities, automobiles, trucks, chasses, unfinished trucks, chasses, unfinished automobiles and all other automotive vehicles.

Applicant has, for a number of years, been engaged in the business of "Driveaway", transporting the above mentioned commodities from points of origin to any and all points within the United States.

Applicant has also been serving large fleet purchasers who may purchase a chassis in one state and have applicant drive the chassis to another state at which point a special body may be mounted and thence to point of delivery. This latter operation may include more than one point of origin of the commodity from almost any point within the United States to any and all points in the United States.

Certificates or permits by various state public utilities commissions not being required for this type of operation, applicant has been serving the public in general as a com-

mon carrier limited to the transportation of the above commodities over irregular routes from any point or origin to any and all cities, towns and municipalities in the territory served.

The term "Driveaway" commonly applied to the business of driveaway more specifically includes:

(1) Driveaway (individual driving of each vehicle under its own power.)

(2) Towaway (driving one vehicle under its own power and towing or pulling another vehicle behind by means of a towbar attachment.)

(3) Bolster Mount and Full Mount (driving one vehicle under its own power upon which is mounted partially (front wheels) or wholly other vehicle or vehicles or combination of both.)

[fol. 71] The principal characteristic of the driveaway business is that automobiles, trucks, etc. are driven under their own power to any point or points requested by any manufacturer, dealer, firm or individual purchaser. The frequency or volume of such delivery is based upon the sales of said motor vehicles and may vary from point to point in different states depending upon the volume of sales. The operation necessarily is characteristically irregular because applicant holds itself out to serve every city, town, village or cross-road in the United States.

From the very nature of the service rendered by applicant to the public, *applicant believes that it should be classified under the Federal Motor Carrier Act as a common carrier limited to the transportation of the above commodities over irregular routes from points of origin to any and all points in the United States.*

Statement No. 2

I-D. The only interruption of service, if it can be called such, is a very substantial curtailment of operations for a short time the latter part of each year at which time the automobile industry is engaged in the changing of models. The driving of automobiles and trucks during this period is reduced to a low minimum until such time as the manufacturing of new vehicles is resumed and motor vehicles are ready for distribution.

[fol. 72] *Statement No. 3*

II. A complete description of routes regularly operated on June 1, 1935 would necessarily involve the naming of every main United States highway as well as every highway in each state in the territory served by applicant in its driveaway operation, if the use of any of the highways in its operation, can be called operating over regular routes. The driveaway operation as mentioned heretofore has never required certificates of Public Convenience and Necessity by various states in or through which the automobiles were driven under their own power. Such automobiles, trucks and other automotive vehicles were delivered to all points in the territory served by this applicant upon request. From the very nature of the business, the operation is very irregular.

The use of highways in driving automobiles between larger towns is much more frequent than to smaller towns or off-route points. Only such use of the highways could possibly be called regular routes but even such classification, applicant believes, would be illogical and impossible to set out in detail the entire territory served by applicant as shown in the exhibits attached hereto and made a part hereof. Classifications based upon the frequency and use of the highway would not only be illogical but very indefinite. In addition, the frequency of service, unlike that of a common carrier of freight, is subject to constant change depending entirely upon one industry and primarily upon the sales and distribution of automobiles, trucks and all other automotive vehicles.

Applicant believes, therefore, that subject to the conditions mentioned heretofore, it did not operate over regular routes but held itself out as a driveaway operator on June 1, 1935, serving all the states in the specified territory as a common carrier limited to the transportation of automo-
[fol. 73] biles, trucks, chasses, unfinished automobiles and all other automotive vehicles by means of driveaway over irregular routes and as proof of such operation attaches shipping bills as shown in Exhibit "B" Statement No. 2, specific reference to which is hereby made, showing actual operations in the following territory:

States of: *Passing Through But No- Serving the States of* Idaho, Utah, Nebraska, Nevada, Colorado, Iowa, Wy-

oming, Kansas, Oklahoma, Missouri, Illinois, Indiana, Ohio and Virginia. *Serving the States of* Michigan, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, *Arkansas, Texas, Washington, Oregon* and *California.*

Applicant believes that it is entitled to a certificate as a common carrier limited to the transportation of automobiles, trucks and all other automotive vehicles operating over irregular routes serving all the states above listed.

Statement No. 4

II-B-C-D-E-F

The matter of routes, acquisition or sale of routes is not involved in applicant's operation of its driveaway business. Applicant operates irregularly over all highways in the territory served. There were no requirements by states for certificates or permits setting forth any routes, regular or irregular for driving of cars under their own power. This type of business to the present time has been unregulated but applicant believes that this type of operation as defined in Statement No. 1 does come within the provisions of the Federal Motor Carrier Act and makes this application in conformity therewith.

[fol. 74] *Statement No. 5*

II-G. As explained in Statement No. 2 of Exhibit "A", there is a very substantial curtailment and in some instances operations cease for a period of approximately two months at the end of each year at which time the automotive industry is engaged in the changing of models. Such seasonal operations if it can be called such depends upon the policy of the various manufacturers in changing models. The period of such change may be moved from one period of the year to another. The transportation of the commodities mentioned in this application by applicant is, therefore, subject to the seasonal changes of the automotive industry.

Statement No. 6

III. As referred to in previous statements, the entire operation as covered under this application was operated over irregular routes on June 1, 1935 in the following territory:

States of: *Passing Through But Not Serving the States of:* Idaho, Utah, Nebraska, Nevada, Colorado, Iowa, Wyoming, Kansas, Oklahoma, Missouri, Illinois, Indiana, Ohio and Virginia.

Serving the States of: Michigan, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Arkansas, Texas, Washington, Oregon and California.

The very nature of applicant's business, namely the driving of automobiles, trucks and all other automotive vehicles to any city, town, village, or cross-road within the territory mentioned heretofore in which a sale is made or automobiles ordered by dealers or manufacturers makes it necessary to transport such commodities and maintain the service of a common carrier limited to the transportation of the commodities mentioned heretofore.

Therefore, applicant believes that it is entitled to a certificate as a common carrier limited to the transportation of automobiles, trucks, etc. over irregular routes serving all the states above listed.

[fol. 75] *Statement No. 7*

III—B. Applicant's principal traffic originates in all the automobile manufacturing points in the territory in or through which it operates and where automobiles, trucks, bodies, cabs, chasses, unfinished automobiles and all other automotive vehicles are manufactured, either at main plants, assembly plants, specialty plants or otherwise. Even this traffic is subject to constant change following any and all changes of plant location of the automotive and its allied industries.

Applicant also receives traffic to and from any and all transfer points, boat docks or from any company, individual or individuals requesting its service to all points in the territory it serves.

There is also an additional volume of traffic originating in various states from back hauls or cross movements and

from small specialty plants which are engaged in special or partial assembly of motor vehicles and parts thereof. A typical example of such a movement is as follows: A chassis might be purchased from one manufacturer and applicant may transport it to a specialty shop for a particular kind of brakes. From this point it is transported to another manufacturer in another state for installation of a special type of body and from there to another manufacturer in still another state for the installation of other special equipment. Then from this point of origin it may be transported back to the original point of origin from which place it may again be delivered to any designated point as requested by the purchasers. Such a procedure might take days or weeks and applicant may be transporting the same commodity from any number of points of origin any number of times. This is a typical example why the point of origin of the above mentioned commodities cannot be fixed to definite places within the territory served.

[fol. 76] Applicant's business necessarily depends upon the automobile and its allied industries and the point of origin of such traffic cannot be fixed to any definite point or number of points but necessarily follows the developments of the automotive industry and its allied industries as a whole in the territory served and as shown in the attached exhibits.

Statement No. 8

III—C. As explained in previous exhibits and statements, due to the peculiar nature of the commodities hauled, deliveries are made to every point or points within the territory served by applicant. The movement of the commodities transported by applicant originates from the points mentioned in Exhibit "A", Statement No. 7, III—B and deliveries are made over irregular routes to all cities, towns, villages or cross-roads within the territory mentioned heretofore in which a sale is made of automobiles ordered by dealers or manufacturers. Even such deliveries are subject to constant change to the various policies of the different manufacturers.

The irregular movement mentioned is one of the peculiarities of this type of hauling and one of the principal reasons justifying the request of applicant for the creation of a special class under the general common carrier class in

pursuance to the provisions of Sub-Section C of Section 204 of the Federal Motor Carrier Act.

[fol. 77] *Statement No. 9*

III—E. The nature of applicant's irregular operation and the change necessary due to business fluctuations, etc. have already been fully explained in previous statements, particularly Statements No. 1, No. 3 and No. 8 under Exhibit "A".

Statement No. 10

IV. No vehicles were used in the transportation of the commodities mentioned in this application.

Automobiles and trucks were driven under their own power in such manner as described heretofore.

[fol. 78] EXHIBIT B

John P. Fleming Driveaway Service

(Name of applicant)

Evidence of Operation

I. Applicant as a common carrier on June 1, 1935, or a contract carrier on July 1, 1935, submits the following evidence as proof of his operations:

A. Certified copy of any order of any State authorizing applicant's or predecessor's operations and of any order authorizing transfer of such authority to applicant. (Attach and identify as statement B-I-A.) See Statement No. 1, Exhibit "B".

B. That applicant or a predecessor was registered under a Code of Fair Competition as follows:

Registrant (If predecessor, give name): John P. Fleming Driveaway Service.

Name of Code: Trucking Code.

Date or dates of registration: 12-31-34.

C. Any other proof deemed necessary by applicant, such as affidavits, bills of lading, route schedules, port of entry

receipts, etc. (Attach and identify as statement B-I-C.) See Statement No. 2, Exhibit "B".

Statement No. 1

I—A. Applicant was not required to obtain any orders or certificates from any state in order to conduct its driveaway operations as defined heretofore.

Proof of its driveaway operations will be given under Exhibit "B", Statement No. 2.

[fol. 79] *Statement No. 2*

STATE OF MICHIGAN,
County of Wayne, ss.:

John P. Fleming of the city of Detroit, being first duly sworn deposes and says that he is owner of John P. Fleming Driveaway Service which company is making the attached application for a certificate under the Grandfather Clause of the Federal Motor Carrier Act and that he makes this affidavit for and on behalf of the company to substantiate and prove its operations in the states of:

Alabama, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, South Carolina, Texas, Utah, Wyoming, Virginia, and Washington, which states did not have regulatory laws requiring the issuance of certificates or permits to interstate operators operating in and through said states.

Deponent further says that in order to meet the requirements of the application and particularly Exhibit "B" he is also attaching to this affidavit primary evidence to support and substantiate the allegations in this affidavit, namely, original copies of shipping bills for the attached hereto and made a part hereof.

Deponent further says that the shipping bills, etc. were picked at random to cover the period mentioned heretofore and only in such numbers as to show its bona fide operation in and to such territory, as required under the Federal Motor Carrier Act and deponent will, at any time, produce [fol. 80] upon the request of the Interstate Commerce Commission additional shipping bills, affidavits and other primary evidence and that the attached exhibits were re-

duced to such a number as not to make this application unreasonably bulky.

Further deponent says not.

(Signed) John P. Fleming, Deponent.

Subscribed and sworn to before me this 5 day of February, A.D. 1936. (Signed) George S. Dixon, Notary Public, Wayne County, Mich. (Seal.)

[fol. 81] PROTEST BY RAILROAD COMMISSION OF TEXAS

Before the Interstate Commerce Commission Motor Carrier Bureau Division Number 5

Application of: John P. Fleming Drive-way Service, 12801 Kercheval Avenue, Detroit, Michigan

Application for a common carrier certificate under Subdivision 'A' of Section 206, Federal Motor Carrier Act 1935

Protest by the Railroad Commission of Texas Against the issuance of either a common carrier certificate under Subdivision 'A' of Section 206, or a contract carrier permit under Subdivision 'A' of Section 209 (Grandfather Clause) Federal Motor Carrier Act 1935, to the applicant.

Texas Commission Protest No. 303

February 21, 1936.

I. C. C. Docket No. —

To the Interstate Commerce Commission Motor Carrier Bureau Division No. 5:

Now comes the Railroad Commission of Texas, the duly elected and qualified Commission, charged by law with the duty and responsibility of administering the provisions of Article 911-b, (Texas Motor Carrier Act) Revised Texas Statutes 1925, and files this protest against the granting of either a common carrier certificate or a contract carrier permit under either of the 'Grandfather Clauses' of the Federal Motor Carrier Act 1935 to applicant and in support thereof informs the Interstate Commerce Commission, Motor Carrier Bureau Division Number 5, that:

I

The Texas Motor Carrier Act, Article 911-b, Revised Texas Statutes 1925, became effective August 21, 1931,

as an amendment to the former Motor Carrier Act and thereby repealing said former Act. Since the effective date of the present Texas Motor Carrier Act, the Commission has conceived it to be its duty by reason of the various terms and provisions of said Act to require all motor carriers for hire, as therein defined, whether transporting [fol. 82] intrastate or interstate commerce, to procure from it either a certificate authorizing a common carrier motor carrier service, a contract carrier permit authorizing a contract carrier service or a special commodity permit authorizing the transportation of the special commodities named in Subdivision 'D' of Section 6, of said Act. The Texas Commission has, so far as intrastate applications were concerned, granted or denied same upon considerations of adequacy of the facilities of existing transportation facilities, the effect the proposed motor carrier operation would have upon the existing facilities if adequate and upon consideration of whether or not the proposed operation would result in injury or damage to the highways and whether or not such proposed operation would unreasonably interfere with the public's use of said highways for general purposes; and as to interstate applications, the Texas Commission has determined whether or not it would grant same upon considerations only of whether or not the proposed operation would do injury or damage to the highways and whether or not the proposed operation would unreasonably interfere with the public's use of said highways for general purposes. In determining whether or not it would grant an operation proposed by an applicant to transport the special commodities named in Subdivision 'D' of Section 6, of said Texas Motor Carrier Act, the Texas Commission has taken into consideration only the highway conditions and the probable interference which the proposed operation would cause the general public's ordinary use of the highways involved.

II

As to actual operations of the applicant, the protestant alleges upon information and belief, based upon reports of its employees required by law to make investigations of motor carrier operations, that the applicant has not [fol. 83] during the year 1935, nor upon the dates of either June 1 or July 1, 1935 operated over the highways of the state of Texas in the transportation of property for hire

to such an extent or in such manner as to support a claim that such operations were conducted in good faith.

III

The applicant was not on June 1, or July 1, 1935, the holder and owner of any permit or certificate issued by the Railroad Commission of Texas.

IV

Any operation conducted over the highways within the State of Texas by the applicant either as a contract carrier, as a common carrier or as a special commodity carrier on, prior to or subsequent to either June 1, or July 1, 1935, or any time during the year 1935, were unlawful and, therefore, not bona fide operations for the following reasons, to-wit:

(a). It is unlawful for any motor carrier, either interstate or intrastate, to transport property for hire over the highways of the State of Texas without having first obtained from the Railroad Commission of Texas either a permit authorizing a contract carrier service or a special commodity carrier service or a certificate authorizing a common carrier service. (Article 911-b Revised Texas Statutes 1925).

(b). The applicant may not claim that he is the successor in ownership of any contract carrier motor carrier permit or special commodity carrier motor carrier permit issued by the Railroad Commission of Texas for the reason that Article 911-b Revised Statutes of Texas 1925 (present [fol. 84] Texas Motor Carrier Act) does not authorize the lease, sale, inheritence or in any other manner the transfer of such permits.

Wherefore, The Railroad Commission of Texas respectfully requests that the Interstate Commerce Commission refuse the application of the applicant; or, in the alternative, set said application for hearing and grant this protestant the opportunity to submit proof of facts herein alleged.

(Signed) Ernest O. Thompson, Ch[illegible]rman Railroad Commission of Texas

[fol. 85] PROTEST BY THE PUBLIC SERVICE COMMISSION OF MISSOURI

Before the Interstate Commerce Commission

John P. Fleming Driveaway Service Detroit, Michigan Applicant for a Certificate under the "Grandfather" Clause, Section 206, Motor Carrier Act, 1935.

Objections to Granting of Certificate

Comes now the Public Service Commission of Missouri, and objects to the granting of said certificate, and as reason therefor, states:

That the Public Service Commission of Missouri is vested with power and authority, and it is the duty of the Commission to license, supervise and regulate every motor carrier operating for hire over the public highways of the State of Missouri; to promulgate and approve rules and regulations governing the operation thereof; after the filing of a petition and a hearing thereon, to issue or reject interstate permits; to assess and collect fees and taxes from those so engaged within the State of Missouri.

The above-named applicant states that he operated or held himself out as a bona fide common carrier on June 1, 1935, within the State of Missouri. The records of the Public Service Commission of Missouri show that neither the applicant, nor predecessor in interest, if any, has been issued a permit to so operate as a common carrier within the State and has not paid the fees and taxes so provided, and any operation as a common carrier conducted by the said applicant, or predecessor in interest, if any, has been in violation of the Missouri statutes.

[fol. 86] Therefore, insofar as it pertains to operation within the State of Missouri, as said applicant was not a bona fide operator within this State on June 1, 1935, objection is made to the granting of the certificate for which application was made by the above applicant.

Public Service Commission of Missouri, Robert E. Holliway, Secretary. (Seal.)

Dated at Jefferson City, Missouri, this 21st day of May, 1936.

[fol. 87] PROTEST BY THE PUBLIC UTILITIES COMMISSION OF OHIO

Before the Interstate Commerce Commission

JOHN P. FLEMING, dba John P. Fleming Driveaway Service, 128 Kercheval Avenue, Detroit, Michigan

Applicant for certificate or permit under "Grandfather" Clause, Section 206, Motor Carrier Act, 1935.

OBJECTIONS TO GRANTING OF CERTIFICATE OR PERMIT

Comes now The Public Utilities Commission of the State of Ohio and objects to the granting of said certificate or permit and, as reasons therefor, states:

That the objector is the duly appointed, qualified and acting Public Utilities Commission of the State of Ohio and, as such, is vested with the power to grant or revoke a certificate or permit to those engaged in public transportation by motor vehicle or truck, together with the supervision of those operating under certificate or permit, and the duty to collect taxes and fees from those so engaged; and that such certificate or permit is a condition precedent to legal operation within the State of Ohio.

The records of the Commission show that neither the applicant nor any predecessor in interest, held a certificate or a permit to operate as a common carrier or as a contract carrier within the State of Ohio on July 1, 1935. In the event either was so operating within this state at that time, such operation was in violation of the law and not a bona fide operation within the meaning of the Motor Carrier Act, 1935.

Objection, therefore, is made to the granting of any [fol. 88] rights to operate in interstate commerce over the highways of the State of Ohio by the said applicant as it had not complied with the laws of Ohio relative to such operation on or before July 1, 1935.

(Sgd.) E. J. Hopple, Chairman. Charles F. Schaber, R. D. Williams, Commissioners.

Dated at Columbus, Ohio, this 14th day of April, 1936.

[fol. 89] PETITION OF INTERVENTION BY WESTERN COMMON CARRIERS

Before the Interstate Commerce Commission

Application of John P. Fleming Driveaway Service for a certificate to operate as a common carrier by motor vehicle in the transportation of automobiles, trucks, chassis, unfinished automobiles and all other automotive vehicles.

Docket B. M. C. 48654

Petition of Intervention

Come now your petitioners, common carriers by railroad operating in the western district of the United States, as indicated in Appendix A, attached hereto and made a part hereof, and respectfully represent that they have an interest in the matters involved in the above entitled proceeding now set for hearing before Examiner A. E. Later on July 23, 1936, at Detroit, Michigan, and desire to intervene and protest in and become parties to said proceeding, and for grounds for the proposed intervention and protest say:

I

That petitioners are corporations engaged as common carriers by railroad in the transportation of property, including vehicles of all kinds, in the western district of the United States.

II

That the applicant, John P. Fleming Driveaway Service, in the above entitled proceeding seeks authority and a certificate as a common carrier for the transportation of automobiles, trucks, chassis, unfinished automobiles and all automotive vehicles passing through but not serving points [fol. 90] in the states of Idaho, Utah, Nebraska, Nevada, Colorado, Iowa, Wyoming, Kansas, Oklahoma, Missouri, Illinois, Indiana, Ohio and Virginia, and serving points in the states of Michigan, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Arkansas, Texas, Washington, Oregon and California, and in so doing seeks

authority to transport such property in direct competition with each and all of your petitioners; that the above entitled proceeding will involve the interpretation of the Motor Carrier Act, 1935, and its application to operations which have been or may hereafter be conducted by applicant, and which are in direct competition with your petitioners; and that your petitioners are informed and believe, and, therefore, state on information and belief, that applicant seeks a certificate to conduct operations not authorized by law, and that applicant was not on June 1, 1935, engaged in bona fide operations as a common carrier by motor vehicle in the transportation of the commodities in the area and in a manner which should legally authorize the issuance of the certificate sought; and, therefore, your said petitioners will be vitally and directly affected by the issuance of the certificate prayed by the applicant and by the interpretation of said Motor Carrier Act, 1935, by the Interstate Commerce Commission; your petitioners, therefore, believe it in their interest and in the public interest that they be permitted to become parties to this proceeding in order that they may participate therein, present their views by oral or written argument, enter their protest against the granting of the certificate as prayed by the applicant and be of such assistance as they can to the Commission in determining the facts in such proceeding and the proper interpretation of the Motor Carrier Act, 1935, as to the questions involved.

[fol. 91] Wherefore, said petitioners pray leave to intervene and be treated as parties in this proceeding, and to protest against the issuance of a certificate as prayed by the applicant, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Respectfully submitted, Joseph H. Hays, Attorney for Petitioners, 474 Union Station Building, Chicago, Illinois.

July 23, 1936.

Appendix A

The Alton Railroad Company.

Atchison, Topeka and Santa Fe Railway.

Chicago and Eastern Illinois Railway Company (Charles M. Thomson, Trustee).

Chicago & North Western Railway.

Chicago, Burlington and Quincy Railroad Co.

Chicago Great Western Railroad (Patrick H. Joyce and Luther M. Walter, Trustees).

Chicago, Milwaukee, St. Paul and Pacific R. R. (Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees).

The Chicago, Rock Island & Pacific Railway Company (Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees).

The Denver & Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees).

The Denver & Salt Lake Railway Company.

Duluth, Winnipeg & Pacific Railway.

Fort Smith and Western Railway (L. B. Barry, Jr., Receiver).

[fol. 92] Great Northern Railway.

Illinois Central Railroad Company.

Illinois Terminal Railroad System.

The Kansas City Southern Railway Company.

Litchfield and Madison Railway Company.

Louisiana & Arkansas Railway Company.

Midland Valley Railroad Company.

The Minneapolis & St. Louis Railroad Co. (L. C. Sprague and John Junell, Co-Receivers).

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

Missouri and Arkansas Railway Company.

Missouri-Kansas-Texas Railroad Co.

Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).

Northern Pacific Ry.

St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, Trustees).

St. Louis Southwestern Railway Lines (Berryman Henwood, Trustee).

Southern Pacific Company.

The Texas and Pacific Ry. Co.

Union Pacific Railroad.

Wabash Railway Company (Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers).

The Western Pacific Railroad Company.

[fol. 93] PROTEST OF SOUTHERN RAIL CARRIERS

BEFORE THE INTERSTATE COMMERCE COMMISSION

BUREAU OF MOTOR CARRIERS

B. M. C. Docket No. 48654

In re: APPLICATION OF JOHN P. FLEMING (JOHN P. FLEMING DRIVEAWAY SERVICE) FOR CERTIFICATE UNDER THE "GRANDFATHER" CLAUSE OF THE MOTOR CARRIER ACT, 1935

Whereas the protestants listed in the Appendix, attached to and made a part hereof, are informed that John P. Fleming (John P. Fleming Driveaway Service), hereinafter referred to as the applicant, whose principal place of business is stated in the application as being in the City of Detroit, State of Michigan, has applied to the Interstate Commerce Commission for a certificate as a common carrier of property under the "grandfather" clause of section 206(a) of the Motor Carrier Act, 1935, to transport motor vehicles under their own power, in interstate commerce, between California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming:

The protestants, by J. E. Tilford, Chairman of the Southern Freight Association, their agent, hereby object to the granting of such application for the following reasons:

1. Because neither the applicant nor its predecessor in interest was in bona fide operation on the date which deter- [fol. 94] mined eligibility for rights under the "grandfather" provisions, to-wit, June 1, 1935, for a common carrier or July 1, 1935, for a contract carrier.

2. Because the present or future public convenience and necessity or public interest do not and will not require the operation of such service.

The applicant had not on or prior to June 1, 1935, applied for or obtained a charter, certificate, permit, license or other appropriate authority from the State of South Caro-

lina authorizing service within, from, to, or through said State, nor otherwise complied with the laws of said State. Without such authority the applicant could not on or prior to said statutory date be in bona fide operation within the meaning of the "grandfather" provisions of the Motor Carrier Act, 1935, and is therefore barred from obtaining authority as a motor carrier of property under the said provisions.

The reference in the next preceding paragraph to South Carolina is not an admission that the applicant was in bona fide operation on or before said statutory date within, from, to, or through other States named in the application.

The protestants are individually and jointly interested in this matter because they operate within and through or from and to the States named in the application extensive lines of railroad engaged individually or jointly in the transportation of all kinds of freight traffic moving from, to, or between points in the States named in the application.

The protestants herein pray to be treated as parties hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, [fol. 95] and be heard in person or by counsel upon brief and at the oral argument if oral argument is granted.

All of which is

Respectfully submitted, (Signed) J. E. Tilford, Agent for Protestants listed in the Appendix hereto.

Dated at Atlanta Ga., July 17, 1936. lrn. 101 Marietta St., Bldg., Atlanta, Ga.

(Sworn verification omitted.)

Appendix

List of Southern Rail Carriers, Protestants in the Foregoing Protest

Alabama Great Southern Railroad Company (The).
Alabama, Tennessee & Northern Railroad Corporation.
Atlanta, Birmingham and Coast Railroad Company.

Atlanta & St. Andrews Bay Railway Company.
Atlanta and West Point Rail Road Company.
Atlantic Coast Line Railroad Company.
Central of Georgia Railway Company.
Charleston & Western Carolina Railway Company.
Chesapeake and Ohio Railway Company (The).
Cincinnati, Burnside & Cumberland River Railway Company.
Cincinnati, New Orleans & Texas Pacific Railway Company (The).
Clinchfield Railroad Company.
Columbia, Newberry and Laurens Railroad Company.
Columbus and Greenville Railway Company.
Danville and Western Railway Company.
Florida East Coast Railway Company.
[fol. 96] Georgia and Florida Railroad.
Georgia Railroad.
Georgia Northern Railway Company (The).
Georgia Southern and Florida Railway Company.
Gulf and Ship Island Railroad Company.
Gulf, Mobile and Northern Railroad Company.
Harriman and Northeastern Railroad Company.
Interstate Railroad Company.
Louisville and Nashville Railroad Company.
Macon, Dublin & Savannah Railroad Company.
Mississippi Central Railroad Company.
Mobile & Ohio Rail Road Company.
Nashville, Chattanooga & St. Louis Railway (The).
New Orleans and Northeastern Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railroad Company.
Northern Alabama Railway Company.
Piedmont and Northern Railway Company.
Savannah and Atlanta Railway.
Seaboard Air Line Railway Company.
Southern Railway Company.
Tennessee, Alabama and Georgia Railway.
Tennessee Central Railway Company.
Western Railway of Alabama (The).
Winston-Salem Southbound Railway Company.
Wrightsville and Tennille Railroad Company.
Yazoo and Mississippi Valley Railroad Company (The).

[fol. 97] EXAMINER'S REPORT

Interstate Commerce Commission

No. MC-48654

John P. Fleming, Common Carrier Application

Report and Order

Recommended By A. E. Later, Examiner

Served September 10, 1937

By application [1] filed February 12, 1936, John P. Fleming, of Detroit, Mich., doing business as John P. Fleming Driveaway Service, seeks authority to continue operation as a common carrier by motor vehicle, limited to the transportation in driveaway service of automobiles, trucks, chasses, unfinished automobiles and all other automotive vehicles, in 12 States [2] passing through 14 others [3], over irregular routes.

In accordance with the provisions of the Motor Carrier Act, 1935, the application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing has been held. Numerous motor carriers of automotive vehicles, individuals, Nicholson Universal Steamship Company and Detroit & Cleveland Navigation Company intervened but offered no evidence. National Automobile Transporters Association, Automobile Contract Carriers Association and International Harvester Company intervened and presented evidence on the jurisdictional [fol. 98] issue. Central Freight Association, western rail carriers, southern rail lines and numerous railroads opposed the granting of the application but did not present any evidence. The Railroad Commission of Texas and cer-

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[1] Under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935.

[2] Serving the States of Alabama, Arkansas, California, Georgia, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington.

[3] Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Nevada, Ohio, Oklahoma, Utah, Virginia and Wyoming.

tain individuals in Nevada protested the granting of the application but did not appear at the hearing in support of their protests. The Public Service Commission of Missouri intervened in opposition to the granting of the application. Briefs were filed by various parties.

Applicant sought to amend the application by adding the States of Pennsylvania and New York as territory to be served. No ruling was made at the hearing on the motion to amend. The motion must be denied on two grounds; (1) No notice was given the regulatory bodies or other officials of the States named as required by the rules of the Commission; and (2) no notice was given interested parties that the application was for authority to operate in said States. The requirement of due process does not permit of unduly broadening the issues at the hearing, which would result from a granting of the proposed amendment.

Overland movement of automotive vehicles, other than by rail, is accomplished by one of the following methods: (1) By loading vehicles on a truck or tractor-trailer unit generally specifically designed for such purpose and transporting them to destination not under their own power; (2) individual driving of automotive vehicle under its own power; (3) driving one vehicle under its own power and towing another vehicle attached to the first by a mechanical device, generally called a tow-bar; and (4) by bolster mount or full mount which consists of driving one vehicle under its own power and upon which another vehicle is partially (front wheels) or wholly mounted, or of combinations of both. This proceeding involves the three last named and [fol. 99] are hereinafter referred to as the driveaway or caravaning methods of transporting motor vehicles.

The driveaway method was first employed during the World War when automobile manufacturers encountered difficulty in securing delivery of their products by rail. In 1928, a total of 3,971,102 new motor vehicles were shipped, of which 30.8 per cent were moved overland other than by rail, 64.7 per cent by rail, and 4.5 per cent by boat. In 1934, the total number shipped was 2,477,860 of which 48.8 per cent moved overland, 45 per cent by rail, and 6.2 per cent by boat. The driveaway and truckaway methods of transporting automotive vehicles occupy a position of major importance in the marketing of these vehicles. The driveaway method is also used in moving used vehicles.

A few concerns, such as applicant, transport exclusively by the driveaway method. However, the large majority of those engaged in overland transportation of such vehicles use both the truckaway and driveaway methods in their operations. The latter concerns usually truckaway for distances up to 600 or 800 miles, and driveaway for longer distances.

Applicant commenced operation of his driveaway service in 1932, and has been continuously engaged in that business to the present time. Attached to the application are a considerable number of copies of shipping or receiving orders covering the period from 1934 to 1936, which show the movement of 388 automobiles, commercial vehicles or trucks from Detroit to destinations in the 12 States [4] for which application is made, and of two automobiles to Agua Caliente, [fol. 100] Mex. A few of the cars were returned to Detroit for various rea ons. It also appears that applicant has transported cars by the driveaway methed from plants in Detroit to docks of steamer lines in that city for transshipment by water to interstate destinations. The record is silent as to whether this was done under a common control, management or arrangement with the steamer lines. It cannot be determined at this time whether or not such movement is subject to the Commission's jurisdiction.

Applicant submitted a statement after the hearing which shows that he transported a total of 1,581 automotive vehicles to destinations in the 12 States for which application is made, and 177 vehicles to points in Iowa, Illinois, Ohio, Missouri, Pennsylvania, New York and Maryland, during the period from March 16, 1933, to July 24, 1936. The origin of these shipments presumably was Detroit. Sixteen vehicles were moved to Michigan destinations, 13 in 1934 and 3 in 1935, but this movement does not appear to be subject to the Commission's jurisdiction; 26 vehicles to destinations in Washington, 14 in 1935 prior to June 1, and 6 in 1936; 8 vehicles to Oregon destinations, all in 1935;

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[4] Georgia 83 vehicles to 4 points, Kentucky 10 to 3 points, Michigan 20 to 2 points, North Carolina 56 to 3 points, Oregon 46 to 2 points, South Carolina 44 to 4 points, Tennessee 49 to 2 points, Texas 15 to 3 points, Washington 15 to 3 points, Alabama 36 to 2 points, Arkansas 9 to 2 points, and California 5 to 3 points.

and 4 vehicles to points in California, all after June 1, 1935. There is undoubtedly some duplication in this list and the shipping and receiving records attached to the application, but it is not substantial. This duplication apparently does not extend to Oregon, Washington and California, except in instances hereafter noted.

The shipping records show that 3 vehicles were moved from Detroit to Seattle, Wash., in April, 1935, 1 in December of that year, and 6 in February, 1936; 10 vehicles in February and 7 in April to Yakima, and 4 to Vancouver, Wash., in April, and 4 in May, all in 1935. Applicant transported 5 vehicles from Detroit to Portland, Oreg., in April, 11 in May, 13 in July, and 13 in October, and 4 each to Klamath Falls and Eugene, Oreg., in April, all in 1935. The [fol. 101] Klamath Falls movement is duplicated in the statement filed after the hearing. The shipping records attached to the application show 1 vehicle transported from Detroit to San Jose, Calif., in August, 1934, 2 to Los Angeles, Calif., in May, and 2 to San Francisco, Calif., in December, 1935. In 1935, or early 1936, a large caravan of taxi-cabs was driven from Detroit to Los Angeles, and a fleet of trucks and a considerable number of passenger cars to San Francisco, according to applicant's testimony. Applicant testified he had hauled to Bakersfield, Calif., and for two distributors in Los Angeles, but only in emergency service. The California business is of recent origin.

The first question raised by the parties to the proceeding is whether applicant's operation is within the jurisdiction conferred on the Commission by the act. It is claimed that driveaway service is nothing more than a chauffeur service. These parties point to the fact that no testimony was presented to the committees of Congress covering driveaway service nor was any mention made of this type of service in the committees' reports to the Congress. The gist of the contention is that a common or contract carrier by motor vehicle under the act is one which uses owned or leased motor vehicles in transporting passengers or property.

The contention cannot be sustained. Section 203 (a) (14) of the act defines the term "common carrier by motor vehicle" as any person who or which undertakes, whether directly or by lease or any other arrangement to transport passengers or property or any class or classes of property for the general public in interstate or foreign commerce by

motor vehicle for compensation. A contract carrier is one who or which transports passengers or property for compensation under special and individual contracts in interstate or foreign commerce. Section 203 (a) (19) provides that the "services" and "transportation" to which the act applies include all vehicles operated by, for, or in the [fol. 102] interest of any motor carrier irrespective of ownership or of contract, expressed or implied, together with all facilities and property operated or controlled by any such carrier and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

A common carrier which takes possession of property enters into a bailment contract to safely move such goods to a destination designated by the shipper and deliver them to the consignee named in the shipping document. In this respect, applicant's operations are identical and the responsibilities to the shipper are the same as those of any common carrier. Applicant holds himself out to move motor vehicles for anyone who may request it to destinations in any of the States for which application is made. When a distributor or dealer desires to have a vehicle moved, applicant is notified and he takes such vehicle or vehicles into his possession, assumes all the responsibilities of a carrier during the time such vehicle is in his possession, settles claims for loss and damage to the property while in his possession, carries insurance to protect himself against the liability he has assumed, pays the driver of the vehicle, selects the routes over which it is to be moved and, in fact, exercises complete dominion over the property. In consideration of the charges to be paid applicant for his services, it is understood that the vehicle to be moved is to be operated under its own power in carrying out the terms of the bailment contract. Where there are several vehicles to be moved it is understood by the shipper that some of them will be driven and others towed or mounted.

It is contended by those who claim the Commission does have jurisdiction that, from a practical standpoint, assumption of jurisdiction is necessary. They point to the fact that it is a common practice to use both truckaway and driveaway in delivering vehicles. They insist that it would [fol. 103] be impractical, if not impossible, to segregate their operations and charges so as to comply with the act, if the driveaway portion was exempted.

Considerable emphasis is laid on the definition of "transportation" by those claiming that the Commission does not have jurisdiction over driveaway service. The ordinary dictionary definition is that "transportation is the carriage of passengers or property," which implies, they say, something other than movement of an automotive vehicle under its own power. Such a narrow definition of "transportation" does not conform with the definition of that term in section 203 (a) (19), nor with the policy of Congress expressed in the act.

The intent of Congress was regulation of motor vehicles operated in interstate or foreign commerce. To exempt driveaway of motor vehicles from the operation of the act merely because the vehicle being moved in interstate or foreign commerce is the property to be transported and furnishes the motive power, would seem to defeat the purpose of Congress. It must be concluded that the transportation regulated by the act includes any transportation of passengers or property for compensation in interstate or foreign commerce which is accomplished by a motor vehicle, irrespective of ownership of the vehicle.

The above conclusion is supported by the interpretation by the courts of the phrase "transportation of a stolen motor vehicle in interstate commerce." A federal statute makes transportation of a stolen motor vehicle in interstate commerce a criminal offense. The gist of the offense is transportation in interstate commerce. The courts have repeatedly sustained convictions where a person has stolen a motor vehicle and driven it across a State line.

[fol. 104] It is contended by intervening rail carriers that if applicant is held to be a carrier, he is a contract carrier, and not a common carrier. They point to the fact that he transports vehicles for not more than one shipper at each of the destinations in the States for which application is made, and that in Oregon applicant has a permit as a contract carrier for a firm of automobile dealers at Portland. Applicant also has a permit to drive and tow automobiles in the State of Nebraska for this firm. At the time of hearing, applicant had filed neither a tariff nor a schedule of minimum rates because of the doubt that existed as to whether his operations were subject to the act, but promised to file a tariff without delay.

The evidence shows that applicant obtained his business by solicitation of dealers and distributors of automotive

vehicles; that he has no written contracts; and that prevailing verbal contracts are merely with respect to the amount to be charged per vehicle. Applicant stated that he would transport automobiles for anyone requesting him to do so and that he now holds himself out to transport automobiles by the driveaway method between any points in the States for which application has been made. There is nothing in the record which would indicate that applicant had refused to transport motor vehicles for anyone who had requested his service.

The mere fact that applicant only hauls for one automobile dealer or distributor at a given point is not significant. Applicant holds himself out to serve the general public and that is the controlling factor in determining his status as a carrier. No. MC 50039, *Drexel Clair Tucker, Contract Carrier Application*, — M. C. C. —. It must be concluded, therefore, that applicant is a common carrier by motor vehicle.

The rail carriers contend on brief that applicant's operation lacks *bona fides* because he had failed to procure certificates from States through or into which he operates. Attached to the application are receipts for taxes paid to [fol. 105] Nebraska, Wyoming, Idaho, Utah, Kansas and Arkansas, which taxes were exacted by those States for the privilege of driving and towing vehicles. Applicant admitted that he did not hold certificates from most of the States into or through which he operates. He testified, however, that he had made inquiry, generally of automotive vehicle dealers with whom he did business in the various States, as to the certificate requirements of such States, and that, with one or two exceptions, he had been informed that certificates were not required.

As heretofore stated, applicant has a contract carrier permit in Oregon and a permit to tow motor vehicles on the highways of Nebraska for a motor company of Portland. Applicant testified that he had operated through the State of Missouri for a considerable period prior to being informed that a certificate was required in that State. The record fails to show when this information was transmitted to applicant. However, the Missouri Public Service Commission decided on December 24, 1935, that a carrier such as applicant was subject to the Missouri law, approved in 1929, and designed to regulate common and contract carriers by motor vehicle. In view of the finding in No. MC 2600,

Earl W. Slagle, Contract Carrier Application, — M. C. C. —, the contention of interveners cannot be sustained. It was held there that the possession of a State certificate was not a condition precedent to the issuance of a certificate or permit under the "grandfather" clauses of the act. The true test of *bona fide* operation was held to be actual operation in the conduct of a legitimate transportation business for hire without subterfuge, deceit, or concealment. Applicant's operations fully meet the test of *bona fide* operation, as laid down in the above cited case.

Applicant's discontinuance of operation in Missouri because he did not have a certificate to operate on the highways of that State is not a circumstance beyond the control [fol. 106] of applicant and his failure to continue operating therein, subsequent to June 1, 1935, forfeits any right which applicant may have had under the "grandfather" clause.

Interveners devoted considerable space in their brief to the question of whether the Commission was required to take judicial notice of State laws pertaining to the regulation of motor carriers and regulations issued thereunder. They insist it is the duty of the Commission to take judicial notice of these laws because members of joint boards, who cooperate in the administration of the act, have knowledge of such laws and regulations and that this knowledge must be imputed to the Commission. They admit, however, that where it is claimed that a State law has been violated, the particular law or regulation violated must be pointed out to the Commission. The only instance where it was claimed that a State law or regulation required a certificate of a carrier such as applicant is that of Missouri. In view of the finding in the *Slagle case*, extended discussion of this contention is unnecessary. It is sufficient to point out that whether or not the Commission will judicially notice a particular fact is one for decision in each case where the fact is essential to an appropriate disposition of the issues. It is not for the Commission in the first instance to decide that a particular State law or regulation has been violated. That is the province of State authorities. The Commission cannot judicially notice a violation of a State law unless such violation is called to the Commission's attention. Here the question of whether or not applicant was required to obtain certificates from any State is not pertinent to the decision of the case.

The railroad interveners contend further that applicant should be required to confine his operations to fixed routes and between fixed termini. They point to the fact that in [fol. 107] serving points in California, Oregon and Washington, applicant had followed U. S. Highway 30 for the greater part of the distance to those points. They further insist that since applicant only served a relatively few points in each of the States for which application is made, that the certificate issued to him should be confined to those points. This raises a question as to the extent of territory which should be given an applicant under the "grandfather" clause.

In deciding that question it is necessary to take into consideration the type of operation, the frequency of the demand of the shippers for which the carrier hauls, and the needs of the public. The record is convincing that applicant's operations are irregular in nature and necessarily so because of conditions in the industry. The same frequency of service which might be required of a general commodity hauler cannot be imposed on a carrier of a special commodity such as automotive vehicles, nor can operations be confined within the same narrow limits. To place on applicant the restrictions contended for, might well destroy applicant's usefulness. The primary test in each case is the requirements of the public. As applicant points out, restrictions of his operation to fixed routes and fixed termini would seriously handicap the conduct of his business and tend to prevent him rendering the type of service which the industry requires. The particular operation requires great flexibility, both as to routes and as to points to be served. Under the circumstances it must be concluded that applicant is entitled under the "grandfather" clause to serve all destinations in each of the States for which application has been made without restriction of route.

The record shows that applicant has only hauled from Detroit to destinations in these States. Authority is apparently sought to operate between all points in each of the States for which application has been made both as to origins and destinations. There is nothing in the evidence [fol. 108] which shows that applicant requires such widespread origin authority except for the return of vehicles to Detroit that have been rejected by the dealer or distributor.

The railroad interveners further contend that since applicant, with minor exceptions, has hauled but one make of motor vehicle, he should be confined to that one make. They further contend that since the vehicles hauled on June 1, 1935, and since that time were new automobiles, any certificate should be limited to the hauling of new vehicles only. These contentions require little discussion. Applicant testified he did not confine his operation to one make of vehicle and other evidence of record corroborates this. He has hauled used automotive vehicles but was not doing so at the time of hearing. The only purpose of such a restriction would be to limit the scope of operation of a motor carrier and prevent adequate service to the public. If Congress had intended any such limitations it would have expressed them in clear language. The contention cannot be sustained.

The examiner finds that applicant was in *bona fide* operation as a common carrier by motor vehicle of automotive vehicles in interstate or foreign commerce over irregular routes between Detroit, Mich., and points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, operating through Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Nebraska, Nevada, Ohio, Oklahoma, Utah, Virginia, and Wyoming on June 1 1935, and has so operated since that time, and that a certificate should be issued authorizing him to continue such operation. In all other respects the application should be denied.

It is recommended that the appended order be entered.

(Signature) A. E. Later, Examiner.

[fol. 109] Recommended by A. E. Later, Examiner. (Signature) A. E. Later.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Order of the Interstate Commerce Commission, Division 5, effective on the — day of —— A. D. 1937

No. MC-48654

John P. Fleming, Common Carrier Application

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by A. E. Later, Examiner, who has made and filed a report herein containing his findings of

fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with all requirements of sections 215 and 217 of the Motor Carrier Act, 1935, and the rules and regulations promulgated by the Commission thereunder, a certificate of public convenience and necessity be issued to John P. Fleming, doing business as John P. Fleming Driveaway Service, authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, of automotive vehicles, over irregular routes, between Detroit, Mich., and points in Alabama, Arkansas, California, Georgia, Kentucky, Michigan, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington, operating through Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Nebraska, Nevada, Ohio, Oklahoma, Utah, Virginia, and Wyoming.

It is further ordered, That the above-described certificate be issued upon the condition that the operations authorized thereunder shall be conducted in accordance with all rules, regulations, and requirements relating thereto issued by the Commission under the Motor Carrier Act, 1935.

It is further ordered, That in all other respects, said application be, and it is hereby, denied.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 110] EXCEPTIONS OF INTERVENING RAIL CARRIERS TO PROPOSED REPORT AND ORDER

Before the Interstate Commerce Commission

Docket No. BMC-48654

In the Matter of the Application of JOHN P. FLEMING for a certificate authorizing transportation of motor vehicles under their own power in interstate commerce between Detroit and certain western and southern states

Exceptions to Proposed Report and Order Recommended By A. E. Later, Examiner

(Filed by all of the railroads appearing)

Come now these intervening rail carriers and except to the report and order recommended by A. E. Later, Examiner, in the following respects:

I. The Examiner erred in finding that applicant was "in bona fide operation" regardless of his having failed to comply with certain state laws which pertained to his right to operate.

II. The Examiner erred in failing to judicially notice the language of certain state laws.

III. The Examiner erred in extending to applicant the right to serve any and all points in each of the states named on a mere showing of previous service to only a limited number of points in each of such states.

[fol. 111] IV. The Examiner erred in failing to require applicant to follow specific routes through certain intermediate states.

V. The proposed order is not consistent with the proposed report in not limiting applicant's permitted operations in the manner specified in the report.

VI. The Examiner erred in failing to limit applicant's authority to the transportation of new passenger automobiles only.

Dated September 28, 1937.

Henry P. Stacy, Frederick V. Slocum, Joseph H. Hays.

[fol. 112] PETITION OF INTERVENING RAIL CARRIERS FOR REARGUMENT

(From District Court Ex. 1)

Before the Interstate Commerce Commission

Docket No. BMC-48654

In the matter of the application of JOHN P. FLEMING for a certificate authorizing transportation of motor vehicles under their own power in interstate commerce between Detroit and certain western and southern states

PETITION OF INTERVENING RAIL CARRIERS FOR REARGUMENT AND RECONSIDERATION BY THE ENTIRE COMMISSION OF THE REPORT OF THE COMMISSION BY DIVISION 5, COMMISSIONERS EASTMAN, LEE AND ROGERS, ENTERED IN THIS PROCEEDING ON SEPTEMBER 19, 1938, AND BRIEF AND ARGUMENT IN SUPPORT THEREOF

(Filed by all Railroads appearing)

Come now the Intervening Rail Carriers above-named, and respectfully petition the Commission to grant reargu-

ment and reconsideration before the entire Commission of the report of the Commission by Division 5, Commissioners Eastman, Lee and Rogers, in the above-entitled proceeding and in support of said petition respectfully show:

I

That because of the broad scope of authority authorized in said Commission's order and the adverse effect the granting of such authority would have on existing transportation agencies and the public generally, and the fact that the report of the Commission in this proceeding as made by Division 5 would be controlling in a large number of cases and under so many circumstances not prevalent in the instant case, the counsel and decision of the entire Com- [fol. 113] mission in this proceeding is required in the public interest.

II

The report of the Commission as made by said Division 5 is in error in holding applicant was "in bona fide operation" regardless of his having failed to comply with certain state laws pertaining to his right to carry on business. (Sheet 7)

III

The report of the Commission as made by Division 5 is in error in finding, "It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends for its traffic entirely upon one industry. This principle should obtain especially where the traffic in question is available only through the distribution and sales of such commodities as automotive vehicles." (Sheet 5)

IV

The report of the Commission as made by Division 5 is in error in that it finds, "Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington, such restrictions apparently would not be in accordance with the operations performed on the statutory date. The fixing of specific termini would also prevent him rendering the type of service he has been performing." (Sheet 6)

V

The report of the Commission is in error in finding, "Although operations to Arkansas, Texas, Oregon and Washington were started just prior to June 1, 1935, they were sufficient in scope to establish that applicant was in bona fide operation in those states on the statutory date." (Sheet 6)

[fol. 114]

VI

The report of the Commission is in error in finding, "that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation. As an incident to the operation, applicant may transport to Detroit from any point in the States to which service is herein authorized, any new vehicle or chassis that has been rejected by a dealer or distributor." (Sheet 7)

VII

The report of the Commission is in error in that the evidence of record is insufficient to support the conclusions reached.

VIII

The report of the Commission is in error in that upon only a showing of previous service to isolated points under the "grandfather" clause, applicant is given authority to serve all points within the several destination states most of which points having never been served by applicant, and many of which points were not served prior to June 1, 1935, and many other of which points were not served subsequent to such date.

IX

The report of the Commission is in error in that such report does not construe the said "grandfather" clause of [fol. 115] said Section 206 in the light of the general purpose of the Act nor apply such construction with a view to effectuating such purpose.

X

The construction of the "grandfather" clause both with reference to the meaning of the words "in bona fide operation" and with reference to the territorial scope of authority to be granted which was adopted in the report is impractical.

XI

The reasons cited in the report for rejection of the construction of the "grandfather" clause urged by these objectors are unsound.

XII

The report of the Commission is in error in that the evidence is not sufficient to support its findings.

XIII

In support of the foregoing propositions reference is hereby made to the brief filed by Intervening Rail Carriers in this proceeding, dated August 13, 1936, and to the exceptions of Rail Carriers to the Examiner's recommended report filed in this proceeding under date of September 28, 1937, and the brief in support thereof, which briefs and exceptions are, by reference, made a part hereof.

Wherefore, petitioners pray that reargument and reconsideration by the entire Commission be granted in the above-entitled cause; that a date be fixed for reargument and that the Commission enter such further order or orders and grant such further relief in the premises as may seem reasonable and just.

Dated at Chicago, Illinois, this 12th day of October, 1938.

Henry P. Stacy, Frederick V. Slocum, Amos M. Mathews, Richard W. Sharpless, Joseph H. Hays, Attorneys.

[fol. 116] PLAINTIFF'S EXHIBIT NO. 2

ABSTRACT OF THE EVIDENCE RECEIVED AT THE HEARING BEFORE THE EXAMINER, JULY 23, 1936

(Page references are to plaintiffs' District Court exhibit 2, which is a certified copy of the reporter's transcript of the testimony received before the Examiner)

Appearances: Carney D. Matheson and George S. Dixon, for applicant, John P. Fleming, etc.; L. E. Smith, for intervenor, Kenosha Auto Transport Corporation; Daniel C. Rogers, for Public Service Commission of Missouri; Joseph H. Hays, for intervening western rail carriers, protestants; Frederick V. Slocum, for members of the Central Freight Association, and the Missouri Pacific Railroad Company, St. Louis-Southwestern Railroad Company, and Texas and Pacific Railroad Company; Henry P. Stacy, for New York Central Railroad Company; S. E. Gregory, for Chicago and North Western Railroad Company, Charles P. Megan, Trustee; R. P. DeCamp, for Illinois Central System.

JOHN P. FLEMING (applicant in the proceedings before the Interstate Commerce Commission) testified as follows (Plaintiffs' Ex. 2, pp. 6-93, 100-136):

I live in Detroit, Michigan and I am engaged in business under the name of John P. Fleming Driveaway Service. I do business as an individual under a registered trade name. My principal place of business is Detroit, Michigan. I am engaged in the business of transporting automobiles, trucks, [fol. 117] chassis and unfinished automobiles, to various parts of the country by the so-called driveaway method, by driving them under their own power; and have been so engaged since 1932. The driveaway operation is conducted in four ways: single car; tow-away, attaching one car with a steel towbar behind another car; bolster mount where the front end of the second vehicle is mounted on the rear end of the front vehicle by means of an apparatus for that purpose; and full mount where one vehicle carries another. Applicant's Exhibit 1 (in plaintiffs' Ex. 3 in this case) was admitted in evidence and shows these methods of hauling.

I transport motor vehicles by these various methods for any concern that requests my services, holding myself out as a common carrier, both in interstate and intrastate commerce, the larger part of the movement being interstate.

Q. You state in your application that you have operated prior to June 1, 1935, in the States of Alabama, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming, and with the corrections that were made at the commencement of this hearing in the States of Pennsylvania and New York. Are you still conducting service in and to those states at the present time?

A. Yes sir.

Q. Does that state the territory that you wish to be covered by your certificate if one is issued to you?

A. That is right.

Q. From what points and to what points within the specified territory do you operate, Mr. Fleming?

[fol. 118] A. From the manufacturers and warehouses to distributors and dealers. Of course, the movement is largely out of Detroit and we have some automobiles returning, but very few.

Q. Do you confine your movement between any fixed termini or fixed territory or over any fixed routes?

A. Well, we cannot do that for obvious reasons.

Q. Explain why you cannot do that.

A. Well, the dealers are situated all over this territory, and naturally it is to our advantage to use the most direct routes and the best roads, and therefore we cannot use fixed routes because our operations are changing from time to time, and because the dealers' accounts change and new business changes its location.

Q. In other words, the inherent nature of your business is the direct movement of these motor vehicles?

A. That is right.

Q. To various people in the territory which you serve?

A. Yes.

Q. In other words, the extent of that operation has really been determined by the business offered to you regardless of destination or point of origin?

A. By the demand.

My operations are subject to fluctuation as automobile production fluctuates. My business drops off during the month of September, the change-over period in the automobile industry. I have a fairly extensive operation for about ten and one-half months of the year and during the change-

over to the new models I confine my operations to only a few. [fol. 119] Q. In operating through these various states and conducting your business, Mr. Fleming, have you complied with all the laws of these various states in and through which you operate?

A. I have complied with all the requirements that have been made upon me. (Plaintiffs' Ex. 2, pp. 10-12.)

In a general way I know the requirements in the various states in which I operate. In traveling from Detroit to Portland, Oregon, the first state which we pass through that requires a permit is Nebraska, and I have complied with all of their requirements, and the other requirements are simple, a license plate for each automobile and a towing fee of ten dollars for the rear car, that is, the car which is towed.

The next state is Wyoming; they require $1.50 road tax, and a dealer's plate on each automobile. These license plates are used on all automobiles passing through the state.

The next state is Idaho, and in the year 1935 they required license plates on each automobile, either Idaho dealer license plates and these license plates I purchased and used until, I don't recall the exact month, but I believe it was in June when they discontinued the use of license plates, and put into effect a law requiring a five dollar tax, a special tax, on each automobile passing through the state. I have paid that tax on each automobile that passed through the state since the inception of the law.

The next state, of course, is Oregon. I have had dealer plates in Oregon. I have had plates and I had them in 1935, and had them in 1936, and in addition to the plates they require a special tax this year of $2.50, and that I paid. Then I have special taxes between here and Portland. [fol. 120] I have complied with all of the state requirements and paid all taxes on every automobile that passed through there.

Now, we will take the State of Utah, because we are going now to San Francisco over the same route, and the State of Utah requires a permit, and it did not require a permit, or I don't think they did in the year 1935. It was merely the latter part of this year, and I have a permit now.

The next is Nevada. Now, just a minute before we pass through Colorado, I believe in going through Nevada they require $7.50 special tax on each automobile, and this tax we paid. No permit is required.

At California the port of entry, there are no requirements for a permit Special tax at times is enforced. When the tax is enforced it is $15 per car. It has only been in force few times, and it seems that that is taken out at times. I believe that covers my routes to the west coast.

Now, then, the State of Missouri requires a permit, and for the past year, since this permit has been required, my operations have not taken me through the state. In the past few months they have not. I applied to an attorney to secure this permit and he has appeared before the Commission. I do not have a Missouri permit.

I am not using the Missouri highways at this time. I am in the process of securing a permit.

In the State of Colorado I have a permit.

Now, I believe that covers the western states. Now, coming back east and going into the southwest, we pay a special tax in Oklahoma, but they require no permit. We pay a permit in Texas. That is called a convoy permit for automobiles passing through the state, if they are consigned to dealers outside. If they are consigned to dealers within [fol. 121] the state the permit is not necessary.

In the State of Arkansas we pay a special fee. This we pay.

In the State of Alabama I have a permit, and I have an Alabama special plate.

In the State of Tennessee we pay a road tax on commercial vehicles only.

In the States of Kentucky, Georgia, North Carolina, South Carolina, Ohio, Michigan, Indiana, Illinois, no license is required and no permit. At least they have not been required for my operations.

In the states that merely require a plate I just attach them to the truck and receive no documentary evidence as to those plates. (Plaintiffs' Ex. 2 pp. 13-16.)

Applicant's exhibits 2 to 8, both inclusive, were admitted in evidence (Plaintiffs' Ex. 2 p. 16; these exhibits are found in plaintiffs' Ex. 3).

Applicant's exhibit 2 consists of fifteen permits, all dated December 30, 1935, all granted to Cohen and Anderson Motor Co. of Portland, Oregon, to drive cars through the State of Nebraska. They were all in one shipment. That is just a sample of the permits I have obtained in Nebraska. The act requiring them became effective in

September, 1935, and since that time I have obtained a receipt for every automobile driven through the state. (Plaintiffs' Ex. 2 pp. 16-17.) (As these permits are all similar, a copy of one of them is here set out as follows):

[fol. 122] Total $14.00

STATE OF NEBRASKA

Department of Roads and Irrigation

Omaha, Nebraska Dec. 30th, 1935

No. 60 Permit

To tow a motor vehicle on the highways of Nebraska.
Issued Douglas County

Receipt of $14.00 fee is hereby acknowledged and permission is thereup granted to Cohen Anderson Motor Co.

Name

14th & Adler	Portland	Oregon
Street	City	State

to tow the following described motor vehicle on the highways of Nebraska from Detroit, Mich., to Portland, Oregon between 12/23 1935, and 1/4 1936

Vehicle being towed Terraplane Style of Body Coupe
Year Motor Wood.....Model.....
Made 1935 Number 177356 Wheels Steel Disc Number.....
Wire.....or Letter 61
Number of Seating or Unloaded
Cylinders 6 Hauling Capacity 2 Weight 2785#
License Number 6307 Fee $1.50
Towing Vehicle Hudson Style of Body Sedar
Year Motor Wood.....Model.....
Made 1935 Number 6633 Wheels Steel Disc Number.....
Wire.....or Letter 65
Number of Seating or Unloaded
Cylinders 8 Hauling Capacity 5 Weight 3285#
License Number 6305 Fee $2.50
Permit Fee..... $10.00
Name of Insurance or Indemnity Company (Seal)
Standard Accident Ins. Co.

Signed County Treasurer

Policy Number JC 383116

By J. H. Hansen
Clerk

Amount $ PL 25000/50000
PD 5000
Cohen-Anderson Motor Co.
Signed Joe Lessard
Applicant

Applicant's Exhibit 3 (contained in plaintiffs' Ex. 3) is a receipt for $12.00 from the Wyoming Highway Department, dated February 27, 1936, for a license to drive two new G. M. C. trucks through the State of Wyoming. With [fol. 123] applicant's Exhibit 3 is an automobile caravan permit dated March 15, 1936, for $17.00 for driving seventeen automobiles through the City of Cheyenne, Wyoming, in compliance with a city ordinance. Both were made out to Fleming. (The following is a copy of the receipt for state fees):

Wyoming Highway Patrol

Date 2 27 1936

Received from Flemming Drive Away Co.
Twelve & no 100 ..... Dollars
T 793
For License to 2 GMC Trucks Motor T 797
1/2 ton pick ups

Reed Koons
Highway Patrolman

$12.00

Applicant's Exhibit 4 (contained in plaintiffs' Ex. 3) consists of three receipts for dealer's license plates in the State of Idaho; one issued to John P. Fleming, dated February 26, 1935; one to Hollace G. Rice, dated May 18, 1935; and one to John Ellison, dated April 12, 1935. (The following is a copy of the Idaho receipt issued to Fleming):

1935 Idaho Motor Vehicle Dealer's Application 1935

Commissioner of Law Enforcement No. 332 A
Boise, Idaho to K

Sir:

I hereby make application through the Assessor of Canyon County for a Dealer's Motor Vehicle License for the year 1935 under the provisions of Chapter 1 Title 48 Idaho Code Annotated.

Name of Dealer John P. Fleming
Style of Firm ..... Place of Business 12801 Kerchival Ave.
Address Detroit County .....
Make of vehicle sold or manufactured .....
John P. Fleming Per Clydesdale Applicant.

Subscribed and sworn to before me this 26 day of Feb., 1935
Fees $60.00 30.00
pd.
This serves as a receipt Emmitt Pfost, Assessor
when stamped by Assessor By Pearl Cavin, Deputy

[fol. 124] Applicant's Exhibit 5 (contained in plaintiff's Ex. 3) consists of two receipts issued by the Utah State

Tax Commission, each for $20.00, each to Fleming, one a license as a dealer in motor vehicles dated March 17, 1936, and the other a license as a transporter dated May 14, 1936. I do not believe this was in effect in 1935, because we went through the state in 1935 and there was no requirement made. (The following is a copy of the dealer's license issued to Fleming by Utah, the transporter license being similar except that he is described as a transporter):

Form TC-120 Rev. 1-1-36 No. 1258

STATE OF UTAH

State Tax Commission

License

For the calendar year 1936

Salt Lake City, Utah
Date Mar. 17, 1936

For the payment of the sum of Twenty.....Dollars by the person below named, he hereby is licensed to conduct the business of Dealer in motor vehicle trailers, or semitrailers at Detroit, Michigan for the calendar year 1936 upon the condition that he complies with the laws of this State with reference to the registration of vehicles and certificates of title therefor. This license is issued under the authority of Section 97, of Chapter 46, Laws of Utah 1935.

Issued to:
John P. Fleming Driveaway Co.
12801 Kercheval
Detroit Michigan

Issued by:
State Tax Commission,
Irwin Arnovitz,
Chairman.

This license is not transferable—To be posted in a conspicuous place.

Applicant's Exhibit 6 (contained in plaintiffs' Ex. 3) consists of two "Carrier's Registration Card and Permit" issued by the Kansas Port of Entry Board, Port No. 1, one to the Heidtman Motor Co., Reno, Nev., dated March 20, [fol. 125] 1936; the other to General Motors, Detroit, Mich., dated February 22, 1936. Both show Michigan license tag 2010. Kansas charges a road tax of two cents per mile for passing through the state. It is my practice to use this receipt in the name of the consignee of the automobiles. That license number is mine and it identifies the receipt as mine. This purports to represent a payment for a car which I was driving for a customer from Michigan through Kansas to Reno, Nevada. (Plaintiffs' Ex. 2 pp. 17-20.)

(This exhibit was admitted, over objection of plaintiffs, with the stipulation that it should be stricken if no connection with it to Fleming is established. Plaintiffs' Ex. 2 p. 20.) (The following is a copy of the permit issued Heidtman Motor Co., the permit issued the General Motors being similar):

No. 413890

KANSAS PORT OF ENTRY BOARD

Carrier's Registration Card and Permit

Port of Entry # 1
Owner Heidtman Motor Co. Address Reno, Nev.
Company ..... Date 3-20-36
License Tag 2010 Mich. Permit Spec. Motor No. 15696
Serial
No. .....Make and Kind of Vehicle Nash & Laf Rated Cap 1/2
Insurance Standard Accident Ins.
Weight
Empty Weight 2800 of Cargo 2800 Gross Weight 5600
Origin of Shipment Racine, Wis. Destination Reno, Nev.
Route 36-7-59 Top. 24-N 40 To leave State Kanorado, Ks.
Taxable Miles 438 Exempt Miles ..... Rate 1½
Driver Ted Blizen I have / I have no } intoxicating liquor on the above listed equipment.

(Signed) .....
Driver

Amt. Tax Paid, $67.80

(Signed) .....Hays.....
Triplicate: To driver Inspector

[fol. 126] Applicant's Exhibit 7 (part of plaintiffs' Ex. 3) is a receipt for an application for "In Transit Tag" in the State of Arkansas. This is a requirement to drive new automobiles through the state, and we paid a tax on every automobile passing through the state. (The following is a copy of such application):

DEPARTMENT OF REVENUES

Earl R. Wiseman, Commissioner

Little Rock, Ark.

Fee $1.50 Each Tag — 10-23 1935

Application For
In Transit Tag

Received of (Name illegible) Transport
Address Detroit, Michigan
the sum of Six and no/100.....Dollars $6.00
for 4 In Transit Tags @ $1.50 each.
(No. Tags Issued)

By Ira Hall
Title 85
County Miss.

No. 1454
3:30 P. M.

Motor vehicles and trailers in the course of delivery from a manufacturer to a dealer, or from one dealer to another, may be operated on the highways without license number plates being attached thereto, provided they display on the rear a placard bearing the words "In Transit," the registration number, the time and date said placard was issued, and the genuine signature of the Commissioner of Revenues or his agent. The fee shall be $1.50 for each vehicle and applies to all motor vehicles operated on the highways of this State which are in transit from manufacturer to a dealer, or from one dealer, whether the same are driven or towed.

Insert The Numbers of Placards
Issued in Space Below

From 8-585 To 8-598 MC

Applicant's Exhibit 8 (part of plaintiffs' Ex. 3) is a towing permit issued by the State of Nebraska authorizing Cohen-Anderson Motor Co., of Portland, Oregon, to tow a certain described motor vehicle across the State of Nebraska between October 12, 1935 and October 18, 1935. It is the practice in Nebraska to make out these permits in [fol. 127] the name of the dealer to which these cars are consigned and not to the transport company, and therefore, in this exhibit the name of the Cohen-Anderson Motor Co. appears instead of Fleming Driveaway Co. This permit was issued for an automobile driven by the Fleming Driveaway Service for the Cohen-Anderson Motor Co. but the application does not use Fleming's name.

All of these receipts and permits were obtained by me or my duly authorized agent in the movement of cars in and

through the states and territories which I serve. These receipts are merely a representative number. I made no effort to obtain all of the receipts through all of the states prior to June 1, 1935.

Q. Now, in the states that you do not have receipts for, do you either have license plates or they have no law as to driveaway business, is that right?

A. I have a permit in Alabama. I am unable to find it on file in my office.

Q. The reason for not producing the license plate is that they are being used in your business at the present time?

A. Yes. (Plaintiffs' Ex. 2 pp. 21-22.)

Applicant's Exhibit 9 was admitted in evidence. (Pltfs'. Ex. 2 p. 23.) This exhibit consists of the original shipping bills which are attached as an exhibit to the original application for authority filed by the applicant with the Interstate Commerce Commission. (They are a part of plaintiffs' Ex. 1 in this case).

(These shipping bills show shipments of automobiles on the dates and to the destinations shown below, arranged by states. Within each state shipments are divided into two main groups, those on or before June 1, 1935, and those after June 1, 1935. In each main group the shipments are shown by cities, arranged alphabetically.)

[fol. 128]

ALABAMA

On or before June 1, 1935

August	17, 1934	Birmingham	12 Hudsons
September	7, 1934	"	4 Hudsons
March	29, 1935	"	4 Hudsons
April	3, 1935	"	4 Hudsons
May	20, 1935	"	6 Hudsons

After June 1, 1935

December	3, 1935	Birmingham	1 Hudson 1 Terraplane
July	2, 1935	Montgomery	4 Terraplanes

ARKANSAS

On or before June 1, 1935

March	9, 1935	Texarkana	5 Terraplanes
April	3, 1935	"	4 Terraplanes 1 Hudson

CALIFORNIA

On or before June 1, 1935

May	22, 1935	Los Angeles	1 Hudson 1 Terraplane
August	14, 1934	San Jose	1 Hudson

After June 1, 1935

December	11, 1935	San Francisco	1 Hudson 1 Terraplane

GEORGIA

On or before June 1, 1935

October	6, 1934	Atlanta	6 Hudsons
December	5, 1934	"	4 Hudsons
January	26, 1935	"	8 Hudsons
April	16, 1935	"	2 Cars
April	18, 1934	Augusta	4 Hudsons
August	7, 1934	"	4 Hudsons
February	21, 1935	"	4 Cars
March	27, 1935	"	4 Cars
March	13, 1935	Columbus	4 Hudsons
May	29, 1935	"	2 Terraplanes
December	24, 1934	Savannah	5 Hudsons
March	27, 1935	"	4 Cars
May	8, 1935	"	4 Hudsons
May	15, 1935	"	2 Dodges

After June 1, 1935

November	2, 1935	Atlanta	6 Terraplanes 1 Hudson
October	31, 1935	Augusta	4 Terraplanes 1 Hudson
December	6, 1935	Columbus	6 Terraplanes
July	25, 1935	Savannah	2 Dodges
November	6, 1935	"	2 Dodges
November	22, 1935	"	3 Terraplanes 1 Hudson

[fol. 129]

KENTUCKY

On or before June 1, 1935

April	17, 1935	Corbin	2 Dodges
June	15, 1934	Louisville	1 Dodge Truck
May	29, 1934	Williamsburg	2 Hudsons
July	27, 1934	"	2 Hupmobiles
May	7, 1935	"	4 Dodges
May	16, 1935	Corbin	1 Dodge
		Williamsburg	1 Plymouth

MASSACHUSETTS

On or before June 1, 1935

March	12, 1934	Boston	4 Hudsons

MICHIGAN

On or before June 1, 1935

October	18, 1934	Battle Creek	5 Hudsons
May	8, 1935	Detroit	3 Hudsons

NEW YORK

On or before June 1, 1935

October	5, 1934	Buffalo	8 Hudsons

NORTH CAROLINA

On or before June 1, 1935

December	27, 1934	Asheville	4 Hudsons
February	25, 1935	"	2 Cars
May	9, 1935	"	2 Hudsons
January	15, 1935	Charlotte	9 Hudsons
February	15, 1935	"	7 Hudsons
May	15, 1935	"	4 Hudsons
November	21, 1934	Raleigh	6 Terraplanes
			1 Hudson
February	21, 1935	Raleigh	9 Cars
May	9, 1935	"	4 Hudsons

After June 1, 1935

November	15, 1935	Asheville	2 Hudsons
September	23, 1935	Charlotte	2 Grahams
November	27, 1935	Raleigh	3 Hudsons
			1 Terraplane

OREGON

On or before June 1, 1935

April	12, 1935	Klamath Falls	4 Cars
April	23, 1935	Portland	5 Hudsons
May	13, 1935	"	11 Hudsons

After June 1, 1935

July	19, 1935	Portland	11 Terraplanes
			2 Hudsons
October	28, 1935	"	5 Hudsons
			8 Terraplanes

[fol. 130]

SOUTH CAROLINA

On or before June 1, 1935

August	20, 1934	Columbia	6 Hudsons
November	30, 1934	"	4 Cars
February	22, 1935	"	8 Hudsons
April	9, 1935	"	4 Hudsons
May	8, 1934	"	4 Hudsons
April	4, 1934	Greenwood	2 Hudsons
December	11, 1934	Hartsville	4 Cars
January	24, 1935	"	4 Cars
April	19, 1935	"	2 Cars
September	13, 1934	Lake City	2 Hudsons
November	8, 1935	Columbia	5 Terraplanes
December	6, 1935	Hartsville	3 Terraplanes

TENNESSEE

On or before June 1, 1935

January	16, 1934	Chattanooga	4 Hudsons
May	29, 1934	"	2 Terraplanes
December	14, 1934	"	4 Cars
March	1, 1935	"	4 Cars
May	16, 1935	"	2 Cars
June	19, 1934	Knoxville	4 Hudsons
July	31, 1934	"	4 Hudsons
November	5, 1934	"	2 Hupmobiles
January	29, 1935	"	4 Hudsons
March	2, 1935	"	8 Cars
April	9, 1935	"	4 Cars

After June 1, 1935

December	18, 1935	Chattanooga	2 Hudsons 4 Terraplanes
December	13, 1935	Knoxville	2 Terraplanes

TEXAS

On or before June 1, 1935

January	3, 1935	Tyler	1 Terraplane 3 Hudsons

After June 1, 1935

December	21, 1935	Laredo	2 Hudsons 4 Terraplanes
January	3, 1936	Marshall	2 Hudsons 3 Terraplanes
January	3, 1936	Paris	4 Terraplanes

WASHINGTON

On or before June 1, 1935

April	3, 1935	Seattle	2 Hudsons
April	26, 1935	Vancouver	4 Hudsons
April	3, 1935	Yakima	7 Hudsons

After June 1, 1935

December	11, 1935	Seattle	1 Terraplane

MEXICO

July	31, 1934	Aguascalientes	2 Hudsons

[fol. 131] Applicant's Exhibit 10 was admitted in evidence. (It is contained in plaintiffs' Ex. 3 in this case.) Applicant's Exhibit 10 is a public liability and property damage and collision insurance policy issued May 28, 1934, by the Yorkshire Indemnity Co. of New Lork, to J n P. Fleming Driveaway Service. It provides protection in the operation of cars in the conduct of his driveaway business. This policy was cancelled by the company and was not in effect at the time of the hearing.

Applicant's Exhibit 11 (contained in plaintiffs' Ex. 3) was admitted in evidence for the purpose only of showing compliance with certain statutory provisions with respect to insurance. It is a "motor truck-cargo policy" issued by the Michigan Fire & Marine Insurance Co., on February 17, 1935, covering the John P. Fleming Driveaway Service as to his driveaway operations. To this policy is attached the endorsement required by the Michigan Public Utilities Commission as a condition to filing a policy with that Commission for motor carrier service under the jurisdiction of that Commission. This policy was cancelled by Fleming.

At the present time Fleming's operations are covered by public liability, property damage, collision, and $50 deductible fire and theft insurance. Counsel for Fleming was authorized by the Examiner to file Fleming's present policy with the Commission as evidence within ten days. (Pltfs. Ex. 2, pp. 23-29.)

I now have 190 or 200 sets of Michigan driveaway plates that I use in my operations. Some of the states recognize my Michigan driveaway plates as a matter of reciprocity but not all of them.

Exhibit 12 was admitted in evidence and is a certified copy of a certificate of registration for conducting business

under an assumed name executed by Fleming on June 22, 1934, and filed in the office of the County Clerk of Wayne County, Michigan, on July 3, 1934, the assumed name [fol. 132] being "John P. Fleming Driveaway Service".

I do not restrict my movement of automobiles to any particular make of car or to any particular individual or corporation as consignee. I have, prior to 1935 and up to the present time, held myself out as a common carrier of automobiles by the driveaway method. I have operated continuously since the filing of my federal application. (Pltfs. Ex. 2, pp. 30-32.)

Cross-examination.

(By Danial C. Rogers, Assistant Counsel of the Missouri Public Service Commission, representing that Commission and other protestants.)

(Public Service Commission of Missouri filed objections to granting of certificate, contained in plaintiffs' Ex. 1. The ground stated in the objection is that applicant Fleming stated in his application to the Interstate Commerce Commission that he operated or held himself out as a bona fide common carrier on June 1, 1935, within the State of Missouri; whereas, the records of the Public Service Commission of Missouri do not show that he was issued a permit to so operate or that he paid the taxes required of common carriers.)

I have been operating since 1932 holding myself out as a common carrier but I have no certificate as such. I have operated in 1934 and 1935 almost continuously through Missouri but not in 1936. I did not make deliveries in the State of Missouri. At the present time I am not operating through Missouri. When I go to Texas or Oklahoma I do not go through Missouri. It is just as near to east of Texas to the points of delivery through Kentucky and Arkansas as it is through Missouri, and it is a more desirable route and I do not have a Missouri permit at this time. However, I have applied to counsel in Missouri to secure me that permit. I concede that the Missouri Public Service Commission holds that it has authority under the Missouri Bus and Truck Act of 1931, to regulate my operations as described [fol. 133] in this application. (Pltfs. Ex. 2, pp. 33-34.)

I wrote to a dealer and had him investigate, and he told me it looked as though at that time there was no requirement

in Missouri, that is the time I was operating through Missouri. He did say he made his investigation at Jefferson City and Joplin. He did not write to the Public Service Commission of Missouri and did not have any information from them. I am not familiar with the Missouri law. I wrote to a man in Jefferson City. He stated a permit is granted without any cost, from the Commission, but it requires my personal appearance before the Commission. For that reason I have not secured the permit. I have not time to appear before the Commission and my business at this time does not require me to travel through that state. I do not recall whether that gentleman informed me that the Missouri Commission permits interstate common carriers to operate through the state without paying fees.

Exhibit 13 was admitted in evidence (contained in plaintiffs' Ex. 3). It is a copy of the Missouri Bus and Truck law of 1931 and of General Order No. 27 containing the regulations of the Public Service Commission of Missouri. (Pltfs. Ex. 2, pp. 34-37.)

I concede that the Public Service Commission of Missouri was holding out that they had the right to regulate me as I operated in Missouri.

Protestant's Exhibit 14 (contained in plaintiffs' Ex. 3) was admitted in evidence. It is a certified copy of a report and order of the Missouri Public Service Commission dated December 24, 1935, in which the Commission holds that driveaway operations similar to those of applicant Fleming are subject to its jurisdiction.

I was never stopped by police officers in Missouri on the question of whether or not I was lawfully operating through Missouri.

[fol. 134] Q. Do I understand you to say that in its requirement, the Missouri Commission was such, you complied with the Missouri Bus Act of 1931, or you intended to do so?

A. Yes.

Q. And you paid the fees and complied otherwise with the law as it may be determined by the courts, with reference to the Missouri Bus and Truck Act?

A. That is right.

Q. You have not done that up to this time?

A. No.

I last operated in Missouri in 1935. I did operate frequently into or through Missouri between June 1, 1935 and

August, 1935. I have not operated to my knowledge through Missouri since August, 1935, but my operations are so extensive that it is possible that our caravans have passed through Missouri without my knowledge even since August, 1935. Since the Nebraska law was put in I believe some of our convoys enter Missouri from Iowa on Highway 71 and run south to St. Joseph and then proceed west across the river. It is quite likely that my operations have passed through Missouri since August, 1935. (Pltfs. Ex. 2, pp. 37-41.)

Cross-examination.

By Mr. Hayes, representing railroad protestants:

I am not now operating through Missouri. I am now seeking authority to operate through Missouri so far as this particular certificate is concerned.

Q. If under the law of Missouri you were required to have secured that permission, your operations through Missouri would have been in violation of the law, if that is the law?

A. Well, I may be confused, but I would say if that is the law, I have attempted and am willing to compiy with any provision of the Commission.

[fol. 135] I learned along in the forepart of 1936 that I was supposed to obtain authority from the Public Service Commission of Missouri and I have avoided the use of the highways of Missouri since that time.

I have filed fictitious name statements in Oregon and Alabama and no other states. (Pltfs. Ex. 2, pp. 41-44.)

In Oregon I made deliveries in 1935 at Portland, Klamath Falls, and Salem. On June 1, 1935, I was engaged in performing service and making deliveries into Seattle, Vancouver, and Aberdeen in Washington. I have only made two trips to Spokane and that was since June, 1935. When I started my operations were chiefly at first in the south and southeast and service into western territory is more or less recent. The bulk of my operations in the west are Hudson and Terraplane cars. (Pltfs. Ex. 2, pp. 52-55.)

I am familiar with the requirements of the law of Oregon for my operations. I secured a contract carrier permit from the Public Utilities Commission of the State of Oregon about January 10, 1936. I secured an Oregon dealers

license in 1935 for my automobiles. I did not secure any other permit or certificate for operation in the State of Oregon at any time prior to January 10, 1936.

When I take possession of cars for delivery from the point of manufacture to destination the title to the cars is in the dealer. The dealer is the one who employs me. I solicit the dealer for the business. (Pltfs. Ex. 2, pp. 56-57.)

Q. In no event are you still performing these services and transporting these cars where you are the owner of the vehicles?

A. Yes, I am. In my operation at this particular time I am the owner of vehicles when they pass through the State of Nebraska.

Q. You are the owner of the vehicles when they pass through the State of Nebraska, because by a ruling of the [fol. 136] Nebraska Department they require vehicles to be registered in the name of the owner and the plates can then be transferred from one vehicle to another by the mere payment of a $1.50 fee, is that right?

A. That is right.

Q. Then in order to save the necessity of buying new plates for any dealer and standing the expense of new plates, you contend that you are the owner of those vehicles when you pass through Nebraska?

A. In title, yes.

Q. In title? And where did you pay for it?

A. I didn't pay.

Q. As a matter of fact, you did not pay for them. You took a bill of sale to them?

A. No, I did not take a bill of sale.

Q. As a matter of fact, when you got to Nebraska you merely contended that you were the owner so that you might use these plates of John P. Fleming Driveaway?

A. That is entirely it, but in Nebraska they file applications, and this law only takes that, if this is the proper way, only in so far as we meet their requirements.

Q. Well, aside from that so-called arrangement in Nebraska, you are not the owner in any of the other states?

A. No.

I never was and do not hold myself out as a dealer in automobiles. I never engaged as a dealer in automobiles in Idaho where I had dealer's plates. I never have been engaged as a dealer of automobiles in Oregon, or at any place.

My contract with Cohen-Anderson Motor Co. of Portland is dated October 1, 1935, and it ran for a period of one year. Under that I agreed to transport vehicles at the rate of $70.00 per car plus taxation. Prior to October 1, 1935, in [fol. 137] operating in Oregon I bought the dealer plates and that was the only requirement they made on me in 1935.

Q. You were a contract carrier, held a contract carrier permit in Oregon, but you were not a common carrier, is that correct?

A. Correct. (Pltfs. Ex. 2, pp. 57-60.)

With my application for a contract carrier permit to operate in Oregon I filed a copy of my written contract with the Cohen-Anderson Motor Co., and I filed no other contract. On June 1, 1935, I was making deliveries at Salem, Oregon, to the Hudson dealer there. I have not made deliveries to Salem since June 1, 1935. For a time I was making deliveries at Klamath Falls, Oregon, but I am not making deliveries there now. At the present time I have no other consignee in Oregon than the Cohen-Anderson Motor Co. at Portland. We made a few deliveries of automobiles to the Karakeen Motor Co. at Portland subsequent to June 1, 1935. I do not remember the date. I made no report of that to the Public Utilities Commission of Oregon. My arrangement is all through Cohen-Anderson for the delivery of Hudsons and Terraplanes and it was prior to June 1, 1935, although according to directions I made a delivery to Klamath Falls or Salem. (Pltfs. Ex. 2, pp. 61-63.)

We secured our permit to operate through Nevada in March, 1936, our first shipment after securing the permit being 24 GMC trucks through Nevada. We sent through there in 1933 or 1934 but there was no tax requirement at that time. It is possible though, that I was not doing business through Nevada in 1935 and did not start again until March of 1936, whatever the records show on my business through there. I had a consignment of 21 Nash cars through there in May, 1936, a third consignment was June 17, 1936, Hudson, Terraplanes, and 13 later in June, 1936.

[fol. 138] I commenced operations this year (1936) with James F. Waters Corporation of San Francisco, dealer in De Soto cars.

Others we have delivered for in California are Earl C. Anthony and the Hudson Car Company. Earl C. Anthony was the Hudson Terraplane dealer in Los Angeles. He is

now handling another make of car and we are not delivering to him now. We ceased doing business with him in the spring of 1936. We started doing business with him in 1935, I am not sure whether it was prior to June 1 or just after, but it was in the summer of 1935.

We used Highway No. 30 for our operations. We paid no fees and had no certificates or permits for the movement of those vehicles through Nevada that we took to Oregon and then down. We moved through Nevada without paying any fees or charges or complying with the requirements of that law if they had any.

I know that we made a few deliveries for Earl C. Anthony in the summer of 1935 but I am not certain as to the date; I think we made about three deliveries, a small number of cars. It was more or less temporary, or a substitute arrangement. Anthony caravans most of his own cars and we helped out when he was not in shape to handle some of his own stuff.

In 1934 we had three shipments, and some in 1935, for the Brown Boyd Motor Company of Bakersfield, California, dealers in Hudson and Terraplane. We are not still doing business with them; that was an occasional shipment, it was not a regular continuous business. Since that time that company has convoyed its own vehicles.

Our most recent delivery in California has been for General Motors taxicabs, dealer cabs, last week (prior to June 23, 1936, the date of the hearing). I delivered some GMC trucks in California in February, 1936, but none prior to that time. In June of 1935, I was not engaged in the business of serving General Motors in the shipment of vehicles to California.

[fol. 139] I now seek authority to move freight through Utah, Nevada, and Idaho, in order to get cars to my three west coast states. I am not seeking authority to make deliveries in the intermediate states and I was not in June, 1935, engaged in that business. I do not want authority to serve Kansas, Oklahoma, Nebraska, Wyoming and Montana, but only want authority to move through those states. (Pltfs. Ex. 2, pp. 65-71.)

In the State of Texas we purchase a convoy permit at the port of entry each time we go in at a cost of $3.50 per car. I served used car dealers in Fort Worth, Texas in 1934; that was my first movement into Texas. I am not now handling used cars. I am not now engaged in handling that business

for those persons at Fort Worth. I serve the Automobile General Corporation of Dallas, dealers in Hudson Terraplanes, and the Hudson Terraplane dealer at Paris and Marshall in Texas. I had been serving the dealer at Dallas something like over a year, prior to June 1, 1935. I have a record of that. I began to serve the dealer at Paris and the dealer at Marshall subsequent to June 1, 1935. We have made deliveries on a few occasions to the Orsinger Motor Company at San Antonio, a Hudson Terraplane dealer. We are not now doing business with him. I believe we made two or three deliveries to him. I would say that his business was an open account on June 1, 1935. The last shipment I handled for him was sometime prior to June 1, 1935. We have not served any other dealers in San Antonio. I say the Orsinger Motor Company was an open account because we were holding ourselves ready to serve him because we had served him in the past, and we were ready to serve him. He was considered one of our standing accounts. I did not give consideration as to any definite time. Any time I do business with any one individual I am willing to do business with him again. I do have a very few written contracts with my customers, other than at Portland. I do not have a written contract with the Orsinger Motor Company. [fol. 140] I handled two or three small shipments for them. I believe those are about the only points in Texas that we served. We go there continuously, though, and have for some time.

We have three accounts in Old Mexico, which we are still serving, Caliente, Chihuahua and Monterey. I believe that was started in the early part of 1936, that is a new account.

In Arkansas we have one place in Texarkana, but we do not serve any other dealers in the state and were not in 1935. (Pltfs. Ex. 2, pp. 71-76.)

There are four or five methods of transportation of automobiles, by rail, by water, by truckaway, and by delivery under their own power, one in tow of another, and the full mount, one vehicle mounted on another. The delivery of vehicles is frequently accomplished by use of a combination of methods. My operation is for hire and I am engaged in the performance of a transportation service to deliver vehicles. I am engaged in a competitive operation with other types of transportation service. Less than five per cent of my operation is ac-omplished by the handling of just one vehicle in single units. I perform this service through the

employment of drivers to make deliveries. The percentage of the chassis I move from one point to another in the performance of the service of installation of bodies, and which in turn move to some other point, is a very small percentage, a small movement. The large percentage of my business is moving Hudson and Terraplane cars but we move many makes and many types. As far as western territory is concerned, during June of 1935 and subsequent to that time practically all of my operation has been in the handling of Hudson and Terraplane cars with some few minor exceptions. That was true on June 1, 1935. (Pltfs. Ex. 2, pp. 77-79.)

In Alabama I serve a Hudson Terraplane dealer named Cullman in Gadsden. I have been doing business with him since some time prior to June, 1935. This is my fourth year doing business for the distributor at Birmingham, a Hudson Terraplane dealer, and with the Hudson Terraplane dis-[fol. 141] tributor at Montgomery, The Hobby Motor Company. I have had a contract to deliver Packard cars at Montgomery for the past two years. Then there is the Apt Motor Company at Birmingham. I believe I do not serve any other consignees in Alabama but I am not positive.

In the State of Georgia we have many accounts. I cannot enumerate them all; the largest is J. W. Goldsmith at Atlanta, a Hudson Terraplane dealer. We deliver Dodge trucks at Savannah.

Q. Well, will you during the noon intermission prepare a list of consignees in Georgia for convenience here, and to save time, a list of consignees in Georgia and the dates when you began to serve them?

A. I would have to go to my files to do that.

Q. Would it be much trouble or inconvenience you to do that?

A. Well, I will call one of the clerks and see if I can get some information together at noon time.

We serve practically every city in South Carolina. Besides Hudsen and Terraplanes we deliver some Dodge trucks and Dodge and Plymouth cars. We deliver Grahams at Wilmington and Charleston. I will likewise bring a list of the consignees in South Carolina.

In North Carolina we deliver Grahams at Winston Salem, and Hudson Terraplanes in that state. (Pltfs. Ex. 2, pp. 81-84.)

Mr. Matheson: May we have one more day to produce all of that information? I am afraid that it will take some time to file and compile all of that, and we would like to have about ten days.

Examiner Later: Off the record.

(Discussion outside the record.)

The Witness: Well, I would say that some dealers come for their own automobiles.

Examiner Later: There is a question raised by counsel as to his being able to furnish all of that information you have [fol. 142] requested for today. Of course, the hearing is not going to last after today, so if he is not able to do so, he may furnish a copy for the record within ten days. Would that be satisfactory?

Mr. Hays: Yes, in so far as those states are concerned. I think it is pertinent information, and if the applicant could get that we would very much appreciate his attempt to do so, so that it could afford an opportunity for cross-examination if it were found to be advisable.

In Kentucky we serve accounts in Louisville and Williamsburg. We served them on June 1, 1935, and still serve them.

We have moved in Tennessee continuously; that was at the inception of my business.

I do not hold any service permits, special permits, or license plates in Georgia. I have not complied with the state requirements or statutes. In South Carolina I have not applied to that Commission as a common carrier and I do not hold any special service permit. I do not hold any special service permit for North Carolina, Tennessee, Kentucky, Virginia, or West Virginia. We pay a mileage tax in Tennessee on commercial cars and trucks. I have had no special fees and no permits from Indiana or Ohio. (Pltfs. Ex. 2, pp. 84-88.)

The number of my regular employees ranges between 60 and 100. I very seldom go on a trip myself. I put some one in charge of the caravan. In paying charges to the authorities of Nebraska we at first used travelers checks. At the present time I am paying by personal check. We formerly paid the State of Wyoming with travelers checks but we are so well acquainted that this year we have been using my own personal check. The convoy leader gets $60.00 for the trip, or more if the convoy is large. He is paid on a mileage

basis. Oils, gasoline and other supplies enroute are paid [fol. 143] for by my own check. The man in charge carries my check made to him and he endorses it to the service station. The convoy leader gets so much per trip and is in sole charge. He advances money to the drivers to the amount needed for their meals and expenses and obtains their receipt. The drivers are paid by the mile with the exception of the three most western states, which is by the trip. The driver on the Portland trip is paid $40.00. For return transportation, the convoy leader has a car equipped to accommodate six or seven men. When the convoy is in excess of 15 cars we at times employ an individual under contract to move two automobiles to the west coast and no return transportation is stipulated in the contract. A great many of our convoys to the west coast involve more than 15 cars. Our average convoy, our ideal convoy, is 17 cars. Very few convoys go through in larger numbers than 17; only at a certain period of the year, and that is when the dealers are stocking up. Our schedule to the west coast is eight days. A driver who is employed to go to the west coast and who is not to be returned is paid $40.00. He pays his own meals and lodging en route. There are persons frequently who are interested in going to the west coast and willing to drive out without my having to incur the expense of driving them back. The drivers are not advertised for. They are men who come and submit an application and leave it on file, and when the occasion arises we in turn will call them in. Our rate is $70.00 to Portland and $75.00 to Seattle, plus taxes we have to pay en route to various states. The rate on driving a single car is 70% of the rate for driving two. There is a difference for the heavier type of vehicles. (Pltfs. Ex. 2, pp. 110-114.)

Examination.

By L. E. Smith, Attorney for Interveners, Kenosha Auto Transport Corporation:

Before operating through Indiana I did not make any inquiry as to whether the laws or rules of the Indiana Com- [fol. 144] mission would apply to my operations.

Before starting a movement into a new territory, it is obvious from contact with other operators or dealers in the territory, what the requirements are, and if any state has a requirement that is of record, to my knowledge, it has been my policy to write for the rule of that particular state

through its proper department and inquire their demands. For instance, before starting my movement into Oregon I was told there was only one state required a license, and that was the State of Idaho. Before operating into any new state I have always made inquiry as to what the rules and laws were. Neither I nor my company nor any of my drivers have ever been arrested in any state for violating a law of the state pertaining to my operations or a rule or regulation of the State Utilities Commission.

I have on file with a very few State Utilities Commissions written contracts with some of my shippers. They are filed to comply with the rules and regulations of the State Commission. I do not recall any contract that has ever been required by a shipper. I have never represented my company to any shipper to be a contract carrier. I want the Commission to issue me a common carrier certificate. I have never refused a shipment if the rates were adequate. (Pltfs. Ex. 2, pp. 118-126.)

Cross-examination.

By Mr. Hays, Representing Intervening Railroads:

Before operating through Illinois we inquired of the State Highway Patrol as to what was required. I found out what was the general practice of all companies operating through the state and we proceeded to do likewise. I might say that in transporting automobiles through Illinois insofar as the enforcement agencies are concerned, there was no requirement that it was necessary that you have license plates because of reciprocity rights in Illinois. If you have license [fol. 145] plates from some other state that does not have reciprocity with Illinois you will be forced to buy an Illinois dealers license plate. I have never read the statutes of Illinois. My convoy leaders were instructed by the law enforcement agencies that we are complying with the law, on Highway No. 6, also on Highway No. 30. (Pltfs. Ex. 2, pp. 131-133.)

Frank A. Schotters, was sworn and testified as follows:

Direct examination.

By Mr. Matheson, Attorney for Fleming:

I am president and general manager of a body manufacturing concern located at Lansing, Michigan. Our only

business is the manufacturing of truck bodies. Our sales are nation-wide in scope and extent. They are liable to be to any firm, person or corporation anywhere in the United States. That raises a particular transportation problem for us. Due to the number of customers that we have and their location and the individual orders whereby large shipments cannot be made, they are all handled individually, that brings up the question of driveaway so far as we are concerned. We have a contract with a large operator, for instance, that has a nation-wide distribution. That is a certain product and we build the entire body requirements for that particular customer. We have close contact with all of the truck manufacturers whereby a chassis is released to us at the point of manufacture, and at that point we take care of the chassis and deliver it to our plant and put the body on the chassis and complete it, and then it is finally sent to destination on our billing, being a complete transaction from the time we pick up the chassis at the truck manufacturer until it is delivered to final destination, and of course there is a certain type of transportation required in getting it to its destinaton. We bill the customer not only for the actual cost of the body, but in addition, an extra item for transportation. We handle the transportation of the chassis to our plant and then the delivery, all [fol. 146] completed, to the customer. We act as a collecting agency for the transportation company in making completed delivery. We are not using the services of John P. Fleming, the applicant. Our needs are being served by Bernard Jenks Driveaway. 99% of the orders give us the method of transportation. We follow the route handling the chassis and completed units as specified by our customers. In some cases it is impossible to use any method of transportation other than the driveaway method. You take trailer bodies, where they have van bodies to transport, it would be impossible to transport them by rail, and, another thing, we find that in the handling where you send bodies to any destination the L. C. L. cost would be prohibitive, and we find that is one of the reasons why driveaway is being used to destinations outside a certain radius. We do not use the towbar method in making deliveries. The dimensions of some of these vehicles and the cost of loading prohibit any other method of transportation. Shipments going to the western coast, we ship by rail to Baltimore, then by boat to the western coast, and those delivered inland by drive-

away. We regard the driveaway method of delivery as a distinct form of transportation. (Pltfs. Ex. 2, pp. 93-99.)

DANIEL C. ROGERS, was sworn and testified as follows:

Direct examination.

By Mr. Matheson, Attorney for Fleming:

Exhibit No. 14 (part of plaintiffs' Ex. 3) was issued on December 24, 1935. That was the first order issued in any convoy case by the Public Service Commission of Missouri. The question whether the Commission intended to cover driveaway operations as such was under discussion for some weeks or months prior to the issuance of this order. (Pltfs. Ex. 2, pp. 136-137.)

[fol. 147] PLAINTIFF'S EXHIBIT NO. 4

(Digest of Fleming's supplemental list of shipments filed by Fleming with the Interstate Commerce Commission on August 16, 1936, pursuant to agreement of counsel. This supplemental list is plaintiffs' exhibit 4, but is here rearranged to show shipments by destination states and by dates.)

ALABAMA

Shipments on or before June 1, 1935

July	14, 1934	Birmingham	4	Vehicles
August	17, 1934	"	12	"
August	18, 1934	"	8	"
September	7, 1934	"	4	"
September	27, 1934	"	4	"
March	29, 1935	"	4	"
May	9, 1935	"	4	"
May	20, 1935	"	6	"

Shipments after June 1, 1935

August	6, 1935	Bessemer	4	"
January	26, 1936	"	2	"
April	11, 1936	"	2	"
April	22, 1936	"	2	"

ALABAMA—Shipments after June 1, 1935—Continued

June	6, 1935	Birmingham	8	"
August	13, 1935	"	5	"
September	10, 1935	"	2	"
November	6, 1935	"	2	"
December	1, 1935	"	2	"
December	12, 1935	"	5	"
January	3, 1936	"	1	"
June	13, 1936	"	1	"
June	25, 1936	"	3	"
July	13, 1936	"	8	"
July	14, 1936	"	9	"
March	12, 1936	Cullman	4	"
November	13, 1935	Gadsden	4	"
December	27, 1935	"	2	"
February	21, 1936	"	2	"
May	7, 1936	"	6	"
July	18, 1935	Montgomery	4	"
November	16, 1935	"	4	"
December	20, 1935	"	4	"
June	2, 1936	"	3	"
July	24, 1936	"	8	"

ARKANSAS

Shipments on or before June 1, 1935

March	9, 1935	Texarkana	5	Vehicles
May	12, 1935	"	15	"

No later shipments

CALIFORNIA

Shipments after June 1, 1935

December	11, 1935	San Francisco	2 Vehicles

[fol. 148]

GEORGIA

Shipments on or before June 1, 1935

July	23, 1934	Albany	7	Vehicles
January	19, 1935	"	4	"
January	31, 1935	"	2	"
August	23, 1933	Atlanta	4	"
September	27, 1933	"	4	"
October	31, 1933	"	4	"
November	12, 1933	"	4	"
December	12, 1933	"	2	"
January	5, 1934	"	2	"
January	16, 1934	"	6	"
January	4, 1934	"	10	"
May	17, 1934	"	11	"

GEORGIA—Shipments on or before June 1, 1935—Continued

June	8, 1934	Atlanta	11	"
June	15, 1934	"	11	"
July	19, 1934	"	9	"
August	6, 1934	"	4	"
August	17, 1934	"	9	"
August	24, 1934	"	4	"
August	24, 1934	"	13	"
September	14, 1934	"	10	"
September	20, 1934	"	4	"
September	26, 1934	"	10	"
October	6, 1934	"	6	"
October	19, 1934	"	15	"
December	6, 1934	"	2	"
December	7, 1934	"	2	"
December	14, 1934	"	11	"
December	21, 1934	"	1	"
December	29, 1934	"	11	"
December	31, 1934	"	4	"
January	21, 1935	"	9	"
February	1, 1935	"	12	"
April	26, 1935	"	12	"
May	29, 1935	"	1	"
November	14, 1933	Augusta	2	"
December	16, 1933	"	4	"
August	7, 1934	"	4	"
February	6, 1935	"	2	"
August	14, 1934	Columbus	4	"
February	19, 1935	"	6	"
April	30, 1935	"	4	"
June	27, 1933	Gainesville	2	"
June	15, 1934	Macon	4	"
August	1, 1934	"	4	"
August	30, 1934	"	4	"
January	9, 1935	"	5	"
May	29, 1935	"	2	"
January	16, 1935	Rome	4	"
February	15, 1935	"	2	"
December	24, 1934	Savannah	5	"
January	18, 1935	"	6	"
May	11, 1935	"	2	"
May	15, 1935	"	2	"

Shipments after June 1, 1935

June	21, 1935	Albany	2	Vehicles
May	8, 1936	"	4	"
August	15, 1935	Atlanta	3	"
November	8, 1935	"	3	"

GEORGIA—Shipments after June 1, 1935—Continued

[fol. 149] Shipments after June 1, 1935

April	3, 1936	Atlanta	6 Vehicles
April	22, 1936	"	3 "
June	6, 1936	"	3 "
June	19, 1936	"	4 "
June	30, 1936	"	1 "
July	24, 1936	"	5 "
June	21, 1935	Augusta	4 "
July	24, 1936	Bremen	2 "
January	25, 1936	Columbus	6 "
July	14, 1936	Douglas	2 "
October	25, 1935	Gainesville	4 "
October	29, 1935	Griffin	4 "
February	6, 1936	"	2 "
August	20, 1935	Macon	2 "
November	14, 1935	"	4 "
December	4, 1935	"	4 "
February	14, 1936	"	2 "
April	16, 1936	"	2 "
July	9, 1936	Ocilla	2 "
August	6, 1935	Rome	2 "
June	3, 1935	Savannah	2 "
June	19, 1935	"	4 "
July	18, 1935	"	4 "
October	14, 1935	"	2 "
November	22, 1935	"	4 "
December	12, 1935	"	1 "
January	4, 1936	"	4 "
March	10, 1936	"	4 "
April	15, 1936	"	1 "
May	11, 1936	"	9 "
July	9, 1936	"	2 "
July	15, 1936	"	2 "

KENTUCKY

Shipments on or before June 1, 1935

April	17, 1935	Corbin	2 Vehicles
June	15, 1934	Louisville	1 "
September	1, 1933	Williamsburg	2 "
October	23, 1933	"	2 "
December	9, 1933	"	2 "
December	27, 1933	"	2 "
August	28, 1934	"	3 "
October	11, 1934	"	1 "
December	29, 1934	"	2 "
March	2, 1935	"	1 "
May	7, 1935	"	4 "
May	29, 1935	"	1 "

KENTUCKY—Shipments after June 1, 1935—Continued

Shipments after June 1, 1935

June	7, 1935	Corbin	1	Vehicle
February	12, 1936	Louisville	1	"
July	3, 1935	Williamsburg	1	"
August	14, 1935	"	2	"
October	8, 1935	"	1	"
November	16, 1935	"	1	"
December	6, 1935	"	1	"
December	18, 1935	"	3	"

[fol. 150] Shipments after June 1, 1935

January	17, 1936	Williamsburg	2	Vehicles
February	8, 1936	"	1	"
March	4, 1936	"	1	"
April	7, 1936	"	2	"
April	17, 1936	"	1	"
May	2, 1936	"	1	"
June	20, 1936	"	1	"
July	10, 1936	"	3	"
July	18, 1936	"	2	"

NORTH CAROLINA

Shipments on or before June 1, 1935

May	17, 1934	Asheville	2	Vehicles
December	27, 1934	"	4	"
January	22, 1935	"	2	"
February	25, 1935	"	2	"
April	18, 1935	"	4	"
January	15, 1935	Charlotte	9	"
January	22, 1935	"	10	"
April	22, 1935	Raleigh	5	"
May	29, 1935	"	12	"

Shipments after June 1, 1935

July	12, 1935	Asheville	2	Vehicles
October	31, 1935	"	4	"
December	12, 1935	"	10	"
March	20, 1936	"	2	"
April	23, 1936	"	2	"
June	11, 1936	"	2	"
November	6, 1935	Charlotte	10	"
November	14, 1935	"	4	"
December	3, 1935	"	5	"
December	9, 1935	"	2	"
December	31, 1935	"	2	"
February	27, 1936	"	4	"
April	17, 1936	"	10	"
May	14, 1936	"	2	"
June	17, 1936	"	2	"

NORTH CAROLINA—Shipments after June 1, 1935—Continued

November	9, 1935	Hickory	4	"
November	15, 1935	High Point	4	"
January	7, 1936	"	4	"
July	11, 1936	Lexington	2	"
January	27, 1936	Marshall	1	"
August	7, 1935	Raleigh	4	"
August	22, 1935	"	4	"
October	16, 1935	"	4	"
March	31, 1936	Salisbury	2	"
June	20, 1936	"	2	"
April	30, 1936	Statesville	2	"
October	12, 1935	Wilmington	2	"
November	15, 1935	"	4	"
February	7, 1936	"	2	"
May	21, 1936	"	4	"
July	2, 1936	"	2	"
July	5, 1936	Wilson	4	"
November	23, 1935	Winston-Salem	3	"
December	20, 1935	"	2	"
April	11, 1936	"	1	"
July	23, 1936	"	2	"

[fol. 151]

OREGON

Shipments on or before June 1, 1935

April	12, 1935	Eugene	4	Vehicles
April	12, 1935	Klamath Falls	4	"

No later shipments

SOUTH CAROLINA

Shipments on or before June 1, 1935

April	3, 1935	Anderson	2	Vehicles
July	14, 1933	Charleston	4	"
November	30, 1933	"	2	"
April	22, 1933	Columbia	2	"
May	3, 1933	"	2	"
May	26, 1933	"	9	"
July	4, 1933	"	9	"
July	25, 1933	"	9	"
September	8, 1933	"	9	"
October	18, 1933	"	9	"
November	6, 1933	"	2	"
November	30, 1933	"	2	"
December	12, 1933	"	2	"
December	29, 1933	"	6	"
January	12, 1934	"	2	"
March	8, 1934	"	4	"
April	4, 1934	"	11	"

SOUTH CAROLINA—Shipments on or before June 1, 1935—Continued

April	10, 1934	Columbia	6	"
April	18, 1934	"	3	"
April	18, 1934	"	8	"
April	19, 1934	"	4	"
April	22, 1934	"	8	"
April	27, 1934	"	9	"
May	2, 1934	"	2	"
May	2, 1934	"	11	"
May	8, 1934	"	4	"
May	11, 1934	"	9	"
May	11, 1934	"	2	"
May	19, 1934	"	5	"
May	29, 1934	"	10	"
June	21, 1934	"	9	"
August	1, 1934	"	9	"
August	20, 1934	"	6	"
August	24, 1934	"	5	"
August	29, 1934	"	9	"
September	7, 1934	"	9	"
September	19, 1934	"	9	"
October	3, 1934	"	9	"
October	20, 1934	"	9	"
November	27, 1934	"	4	"
December	5, 1934	"	4	"
December	11, 1934	"	4	"
December	16, 1934	"	4	"
May	3, 1935	"	11	"
May	16, 1935	"	9	"
April	4, 1935	Greenwood	2	"
April	25, 1934	Hartsville	11	"
May	18, 1934	"	9	"
July	27, 1934	"	9	"
December	11, 1934	"	4	"
January	30, 1935	"	9	"
February	15, 1935	"	4	"
September	13, 1934	Lake City	2	"

[fol. 152] Shipments after June 1, 1935

November	8, 1935	Anderson	4	Vehicles
July	16, 1935	Columbia	9	"
October	5, 1935	"	2	"
November	8, 1935	"	5	"
January	1, 1936	"	2	"
March	18, 1936	"	1	"
April	4, 1936	"	3	"
April	28, 1936	"	9	"
July	10, 1936	"	9	"
July	14, 1936	"	11	"
January	31, 1936	Greenville	4	"

SOUTH CAROLINA—Shipments after June 1, 1935—Continued

June	10, 1935	Hartsville	6	"
November	14, 1935	"	7	"
November	27, 1935	"	5	"
December	28, 1935	"	2	"
February	19, 1936	"	9	"
April	23, 1936	"	2	"
July	1, 1936	"	2	"
June	25, 1936	Spartanburg	2	"
July	11, 1936	"	2	"

TENNESSEE

Shipments on or before June 1, 1935

December	14, 1934	Chattanooga	4	Vehicles
December	21, 1934	"	4	"
January	3, 1935	"	4	"
February	14, 1935	"	4	"
April	13, 1935	"	2	"
May	16, 1935	"	2	"
June	12, 1933	Knoxville	4	"
July	10, 1933	"	2	"
August	12, 1933	"	2	"
September	12, 1933	"	2	"
October	27, 1933	"	2	"
November	27, 1933	"	4	"
December	20, 1933	"	2	"
January	8, 1934	"	2	"
May	16, 1934	"	8	"
May	19, 1934	"	2	"
May	23, 1934	"	2	"
June	19, 1934	"	4	"
June	26, 1934	"	4	"
June	28, 1934	"	6	"
July	27, 1934	"	4	"
July	31, 1934	"	4	"
August	7, 1934	"	8	"
August	28, 1934	"	4	"
September	27, 1934	"	2	"
October	11, 1934	"	2	"
October	16, 1934	"	4	"
October	29, 1934	"	2	"
November	5, 1934	"	2	"
November	13, 1934	"	2	"
November	28, 1934	"	6	"
November	30, 1934	"	6	"
December	5, 1934	"	4	"
December	13, 1934	"	8	"
December	24, 1934	"	6	"
December	28, 1934	"	4	"
January	18, 1935	"	5	"
February	7, 1935	"	4	"
February	20, 1935	"	2	"
April	20, 1935	"	8	"

TENNESSEE—Shipments after June 1, 1935—Continued

[fol. 153] Shipments after June 1, 1935

June	7, 1935	Chattanooga	2	Vehicles
June	28, 1935	"	1	"
July	15, 1935	"	2	"
August	2, 1935	"	2	"
November	14, 1935	"	4	"
November	30, 1935	"	4	"
December	28, 1935	"	4	"
April	18, 1936	"	4	"
May	15, 1936	"	2	"
June	24, 1936	"	2	"
July	15, 1936	"	2	"
June	17, 1936	Elizabethton	2	"
July	9, 1935	Kingsport	2	"
July	16, 1935	"	2	"
December	14, 1935	"	2	"
July	7, 1935	Knoxville	2	"
July	17, 1935	"	2	"
August	12, 1935	"	2	"
December	11, 1935	"	6	"
January	9, 1936	"	4	"
February	27, 1936	"	4	"
April	1, 1936	"	4	"
April	11, 1936	"	2	"
April	28, 1936	"	2	"
October	8, 1935	Nashville	4	"

TEXAS

Shipments on or before June 1, 1935

April	22, 1935	Ennis	2	Vehicles
May	17, 1933	Ft. Worth	2	"
July	20, 1933	"	12	"
December	18, 1933	"	2	"
May	8, 1935	"	6	"
October	4, 1933	Itasca	2	"
November	16, 1933	"	2	"
February	16, 1935	San Antonio	2	"

Shipments after June 1, 1935

April	1, 1936	Colorado	2	Vehicles
July	31, 1935	Laredo	2	"
January	14, 1936	"	4	"
January	28, 1936	"	7	"
March	2, 1936	"	2	"
May	15, 1936	"	5	"
July	15, 1936	"	4	"
December	14, 1935	Marshall	4	"
February	1, 1936	"	5	"
July	10, 1936	"	6	"
July	15, 1936	"	2	"

TEXAS—Shipments after June 1, 1935—Continued

January	3, 1936	Paris	4	"
July	16, 1936	"	4	"
May	1, 1936	Sherman	4	"
November	13, 1935	Tyler	4	"
November	23, 1935	"	4	"
December	5, 1935	"	6	"
December	21, 1935	"	4	"
January	3, 1936	"	4	"
April	10, 1936	"	4	"

[fol. 154] WASHINGTON

Shipments on or before June 1, 1935

May	9, 1935	Vancouver	4	Vehicles
February	28, 1935	Yakima	10	"

Shipments after June 1, 1935

February	14, 1936	Seattle	6	Vehicles

[fol. 155] PLAINTIFF'S EXHIBIT NO. 5

Stipulation

Each of the plaintiffs is a common carrier of property by railroad and each of the plaintiffs is either a corporation duly organized and existing, or trustees or receivers duly appointed and qualified of railroad corporations, as is more specifically set out in the caption of "Plaintiffs' Complaint".

For more than five (5) years last past, one or more of the plaintiffs have been engaged in carrying, or have been participating in the carriage of, new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, as common carriers of property, in interstate commerce, from Detroit, Michigan for delivery to all railroad stations and other points served by plaintiffs in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington; and that one or more of the plaintiffs are so engaged at the present time. The amount of traffic so handled by the plaintiffs has been and is now substantial.

(Signed by all of the parties, plaintiffs and defendants, by their counsel.)

[fol. 156] CERTIFICATE OF COUNSEL

I hereby certify that the foregoing is a true and correct abstract of all of the evidence offered or received in the District Court in this cause which is material to the questions presented upon this appeal.

Dated April 24, 1941.

Amos M. Mathews, Attorney for Plaintiffs, Appellants.

[fol. 157] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PLAINTIFF'S PRAECIPE FOR RECORD—Filed April 28, 1941

To the Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division:

For the purpose of the record on appeal in the above entitled cause, please prepare, certify and transmit to the Clerk of the Supreme Court of the United States a transcript of the following from the files and records of your Court in said cause:

1. Plaintiffs' complaint.
2. Answer of defendant, United States of America.
3. Answer of defendant, Interstate Commerce Commission, and amendment thereto filed on November 26, 1940.
4. Answer of defendant, John P. Fleming, etc.
5. Opinion of the Court, dated January 31, 1941. (This is a part of the statement as to jurisdiction.)
6. Judgment and decree, dated April 7, 1941.
7. Statement of the evidence filed by plaintiffs, and proof of service thereof upon defendants.

[fols. 158-170] 8. Petition for appeal to Supreme Court.

9. Assignment of errors and prayer for reversal.
10. Statement as to jurisdiction of the Supreme Court.
11. Order allowing appeal to Supreme Court of the United States.
12. Notice and proof of service upon defendants of copies of the petition for appeal, assignment of errors, statement as to jurisdiction, and order allowing appeal.
13. Citation with acceptance of service.

14. Cost bond on appeal.
15. This praecipe, and proof of service thereof.

Dated this 24th day of April, 1941.

Amos M. Mathews, Henry P. Stacy, Frederick V. Slocum, Attorneys for Plaintiffs.

NOTICES OF FILING OF STATEMENT OF EVIDENCE AND ACKNOWLEDGMENTS OF SERVICE OF PRAECIPE FOR RECORD OMITTED IN PRINTING

[fols. 171-175] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 176] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR CROSS APPEAL—Filed June 6, 1941

The United States of America, Interstate Commerce Commission and John P. Fleming, defendants in the above-entitled cause, feeling themselves aggrieved by the failure and refusal of the Court to dismiss the above-styled complaint because of lack of standing in the plaintiffs to bring and maintain said suit, and further aggrieved by that part of the final decree entered herein by this Court on April 7, 1941, which purports to annul in part the order of the Interstate Commerce Commission dated September 19, 1938, in proceeding styled *John P. Fleming Common Carrier Application*, No. MC 48654, to the extent of excluding from said report and order the authority therein granted to [fol. 177] transport property from Detroit, Mich., on the one hand, to any points in the State of Arkansas, on the other, and permanently enjoining said John P. Fleming from so operating under the authority of said report and order, pray a cross-appeal from said portion of said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors accompanying this petition, to which reference in hereby made.

Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered be duly authenticated and transmitted forthwith to the Supreme Court of the United States.

Dated June 6th, 1941.

John C. Lehr, United States Attorney; Thurman Arnold, Assistant Attorney General; Frank Coleman, Special Assistant to the Attorney General, For the United States of America; Daniel W. Knowlton, Chief Counsel; Nelson Thomas, Attorney, for Interstate Commerce Commission; George S. Dixon, Attorney for John P. Fleming.

[fol. 178] In the District Court of the United States

[Title omitted]

Order Allowing Cross-Appeal—Entered June 6, 1941

On this day came the above-named defendants, by their attorneys, and presented their petition for cross-appeal and their assignment of errors, together with a jurisdictional statement in accordance with the Revised Rules of the Supreme Court of the United States, which have been duly filed, and upon consideration thereof it is

Ordered And Adjudged that a cross-appeal to the Supreme Court of the United States from the final decree heretofore entered in the above-entitled cause on the 7th day of April 1941, and from the portion thereof granting the prayer of the plaintiffs' complaint, to the extent and in the manner set out in said decree, be, and it hereby is, allowed to said defendants; that a certified transcript of the [fol. 179] record herein be transmitted in due course to the Supreme Court of the United States.

Dated June 6, 1941.

Edward J. Moinet, Judge.

[fol. 180] In the District Court of the United States

[Title omitted]

Assignment of Errors on Cross-Appeal—Filed June 6, 1941

The United States of America, Interstate Commerce Commission and John P. Fleming object and except to the fol-

lowing actions of the Court in the above-styled cause in connection with its final decree, opinion, findings of fact and conclusions of law and file the following assignment of errors with and as a part of their petition for cross-appeal to the Supreme Court of the United States from the action and decree of the District Court entered April 7, 1941, in said cause:

The District Court committed error—

1. In failing and refusing to dismiss the above-styled cause upon the ground that no plaintiffs have standing to [fol. 181] institute or maintain the suit since no one of the plaintiffs has any legal right of interest which is or would be affected, violated or of which a plaintiff would be deprived by the order of the Interstate Commerce Commission complained of.

2. In entering decree annuling in part the order of the Interstate Commerce Commission and enjoining defendant Fleming from operating with respect to the State of Arkansas under authority of the Commission's report and order.

3. In weighing the evidence heard by the Commission and making a statement of fact in its opinion relative to operations in the State of Arkansas that the applicant Fleming's testimony supports a conclusion that in that State his operations had been abandoned when upon substantial evidence before it the Commission had reached the conclusion that Fleming's operations in Arkansas had not been abandoned.

4. In granting to the extent above stated the prayer of plaintiff's complaint upon the statement of facts made in the Court's opinion and findings of fact, instead of denying it altogether.

5. In failing to find that upon the facts stated in the Commission's report the Commission's order was in all respects valid and should be sustained in toto.

6. In failing to find that the facts stated in the Commission's report were supported by substantial evidence in [fol. 182] the Commission record and that said facts and

the findings of the Commission in its report were sufficient in law to support the Commission's order in all respects.

John C. Lehr, United States Attorney; Thurman Arnold, Assistant Attorney General; Frank Coleman, Special Assistant to the Attorney General, For the United States of America; Daniel W. Knowlton, Chief Counsel; Nelson Thomas, Attorney, For Interstate Commerce Commission; George S. Dixon, Attorney for John P. Fleming.

[fols. 183-187] Citation in usual form showing service on Amos M. Mathews, omitted in printing.

[fol. 188] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CROSS APPELLANTS' PRAECIPE FOR RECORD—Filed June 24, 1941

To the Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division:

For the purpose of the record on cross appeal in the above entitled cause, please prepare, certify and transmit to the Clerk of the Supreme Court of the United States a transcript of the following from the files and records of your Court in said cause:

1. All of the documents (with the exception of "Citation" and "Cost Bond on Appeal") listed in praecipe heretofore filed with you by appellants, The Alton Railroad Company et al., for the purposes of the direct appeal. [In the event you prepare, certify and transmit transcript of the documents so listed pursuant to said praecipe, duplication for the purposes of this praecipe will be unnecessary.]

2. Petition for Cross Appeal in the Supreme Court.

3. Cross appellants' Assignment of Errors.

4. Cross appellants' Statement as to Jurisdiction.

[fol. 189] 5. Order Allowing Cross Appeal.

6. Acceptance of Service upon appellants of copies of Petition for Cross Appeal, Assignment of Errors, Statement as to Jurisdiction and Order Allowing Cross Appeal.

7. Citation on Cross Appeal with Acceptance of Service.

8. This praecipe and proof of service thereof.

9. Please transmit to the Clerk of the Supreme Court of the United States the originals of the exhibits introduced in evidence at the trial of this cause in the district court, pursuant to a stipulation approved by the district court heretofore filed with you.

10. Copy of stipulation relative to the transmission of said original exhibits.

Dated this 18th day of June, 1941.

United States of America, by Thurman Arnold, Assistant Attorney General; John C. Lehr, United States Attorney; Frank Coleman, Special Assistant to the Attorney General; Interstate Commerce Commission, by Nelson Thomas, Its Attorney; John P. Fleming, an Individual, Doing Business as John P. Fleming Driveaway Service, by George S. Dixon, His Attorney.

[fol. 190] Service of the foregoing praecipe on cross appeal is hereby acknowledged.

The Alton Railroad Company et al., Plaintiffs, by Amos M. Mathews, Their Attorney.

Dates this 21 day of June, 1941.

[fols. 191-194] Clerk's Certificate to foregoing cross appeal papers omitted in printing.

[fol. 195] IN THE SUPREME COURT OF THE UNITED STATES

No. 110, Oct. Term

THE ALTON RAILROAD COMPANY, et al., Appellants,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; and John P. Fleming, an Individual, Doing Business as John P. Fleming Driveaway Service, Appellees

STATEMENT OF THE POINTS INTENDED TO BE RELIED UPON BY APPELLANTS, AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed June 9, 1941

I

The points to be relied upon by appellants are the assignments of error included in the transcript of record from the District Court.

II

The parts of the record necessary for the consideration of said points and which should be printed are:

All of the transcript of record filed by the appellants in the Supreme Court except the citation and cost bond. The opinion of the Court should be printed as a part of the Record, in addition to its printing as part of the statement as to jurisdiction.

Dated this 31st day of May, 1941.

Amos M. Mathews, Attorney for Appellants.

[fols. 196-200] STATE OF ILLINOIS,
County of Cook, ss:

Affidavit

I, Eleanor Walter, being duly sworn do on oath state:

That, on the 2nd day of June, 1941, I mailed copies of the foregoing statement and designation to the following named attorneys for the appellees by register l United States mail, return receipts requested, and there are attached to this

affidavit the receipts received from the said attorneys pursuant to said mailing:

Mr. Frank Coleman, Special Assistant to the Attorney General, Washington, D. C.

Mr. Nelson Thomas, Attorney Interstate Commerce Commission, Washington, D. C.

Mr. George S. Dixon, Attorney at Law, Penobscot Building, Detroit, Michigan.

Eleanor Walter.

Subscribed and sworn to before me by the said Eleanor Walter this 6th day of June, 1941. A. F. Hucksold, Notary Public. (Seal.)

[fol. 201] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 267

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and John P. Fleming, an Individual, Doing Business as oJhn P. Fleming Driveaway Service, *Cross-Appellants*,

vs.

THE ALTON RAILROAD COMPANY et al., *Cross-Appellees*

STATEMENT OF POINTS INTENDED TO BE RELIED UPON BY THE CROSS-APPELLANTS AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed September 16, 1941

I

The points to be relied upon by cross-appellants are the Assignments of Error stated in the "Assignment of Errors on Cross-Appeal", included in the transcript of record as called for in item 3 of Praecipe for Transcript of Record heretofore filed by the above-named cross-appellants.

II

The parts of the record necessary for consideration of said points and which should be printed are all the portions of the transcript of record already designated for

printing by the appellants (cross-appellees), with the addition of the following portions of the record which are called for by the cross-appellants in their "Praecipe for Transcript of Record", to wit:

[fols. 202-203] Petition for Cross-Appeal
Cross-Appellants' Assignment of Errors
Order Allowing Cross-Appeal
Citation on Cross-Appeal
Cross-Appellants' Praecipe for Transcript of Record
This Statement of Points intended to be Relied Upon by the Cross-Appellants and Designation of the Parts of the Record to be Printed.

(If any of the above items are to be printed pursuant to designation by appellants (cross-appellees), duplication for the purposes of this cross-appeal will be unnecessary.)

United States of America, by Charles Fahy, Acting Solicitor General; Thurman Arnold, Assistant Attorney General; John C. Lehr, United Sates Attorney; Frank Coleman, Special Assistant to Attorney General. Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel; Nelson Thomas, Its Attorney. John P. Fleming, an individual, doing business as John P. Fleming Driveaway Service, by George S. Dixon, His Attorney.

[fols. 204-205] CERTIFICATE OF SERVICE

This is to certify that I have this day mailed a true copy of the attached Statement to Amos M. Mathews, Esq., Attorney for The Alton Railroad Company et al., Appellants and Cross-Appellees, at 517 W. Adams Street, Chicago, Illinois.

Frank Coleman, Special Assistant to the Attorney General.

September 15, 1941.

Endorsed on Cover: File No. 45,438, 45,595. E. Michigan, D. C. U. S., Term No. 110, The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Charles M. Thomson, Trustee of Chicago and Eastern

Illinois Railway Company, et al., Appellants, vs. The United States of America, Interstate Commerce Commission, and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service. Term No. 267, The United States of America, Interstate Commerce Commission, and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service, Appellants, vs. The Alton Railroad Company, et al. Filed May 29, 1941, July 12, 1941. Term No. 110 O. T. 1941, 267 O. T. 1941.

(7147)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHARLES M. THOMSON, TRUSTEE OF CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

STATEMENT AS TO JURISDICTION.

AMOS M. MATHEWS,
HENRY P. STACY,
FREDERICK V. SLOCUM,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Civil Action. No. 1323

THE ALTON RAILROAD COMPANY, ET AL.,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE,

Defendants.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(Filed April 21, 1941.)

Plaintiffs, appellants, state that the basis of the jurisdiction of the Supreme Court of the United States to review the final decree of the District Court in this cause is the following:

This is an action to enjoin and annul an order of the Interstate Commerce Commission. It was tried before a

District Court of three judges and comes to the Supreme Court on a direct appeal.

(a) The statutory provisions believed to sustain the jurisdiction of the Supreme Court are Sections 207, 210, and 238 (4) of the Judicial Code, as amended (28 U. S. C. A. 41 (28), 47a, and 345 (4)); Sections 44 and 47 of 28 U. S. C. A.; and Sections 1 (20) and 205 (g) of the Interstate Commerce Act, as amended (49 U. S. C. A. 1 (20) and 305 (g)).

(b) The final decree of the District Court sought to be reviewed was entered on the 7th day of April, 1941; and the petition for this appeal was presented to the District Court on the 21st day of April, 1941.

(c) Cases believed to sustain the jurisdiction are *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382; *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U. S. 47; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Co.*, 270 U. S. 266; and, independently of these, *Chicago Junction Case*, 264 U. S. 258, 267-268.

The District Court held it had jurisdiction, held that plaintiffs were proper parties to maintain the action, granted a part, and denied the remainder, of the relief asked by plaintiffs. See copy of the Court's opinion hereto annexed as Exhibit "A". Plaintiffs are here appealing from as much of the final decree as denies any relief asked by plaintiffs.

Plaintiffs, seventy-one railroads, brought this action in the United States District Court for the Eastern District of Michigan to enjoin and annul an order of the Interstate Commerce Commission. The order was made under the so-called "grandfather clause" of Section 206 (a) of the Motor Carrier Act, 1935 (now 206 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 306 (a)). It authorized defendant, appellee, John P. Fleming, to con-

tinue in operation as a common carrier of automobiles by the drive-away method from Detroit, Michigan, to all points in various states. Plaintifs carry, or participate in the carriage of, automobiles from Detroit to all of the destinations Fleming is authorized to serve by such order. All except four of the plaintiffs were interveners and protestants in the proceedings before the Commission which resulted in the aforesaid order. After the order was made plaintiffs filed two successive petitions for reconsideration by the entire Commission, which were denied.

The facts are undisputed. Plaintiffs attack the order (1) on the ground that the evidence is not sufficient to sustain it, and (2) on the ground that the Commission erroneously construed the applicable statutes.

Plaintiffs' right as parties to maintain this action is based on Section 1 (20) of Part I of the Interstate Commerce Act, and Section 205 (h) of the Motor Carrier Act, 1935, Part II of the Interstate Commerce Act. By the Transportation Act of (Sept. 18) 1940, 54 Stat. 899, c. 722, Section 205 (h) was re-numbered 205 (g). In 49 U. S. C. A. these are now sections 1 (20) and 305 (g), the latter formerly being 305 (h). Plaintiffs rely on the cases cited in the paragraph lettered (c) above. Independently of other grounds, sixty-seven of the plaintiffs are proper parties through their participation in the proceedings before the Commission: *Chicago Junction Case, supra,* pp. 267-268.

Respectfully submitted,

Amos M. Mathews,
Henry P. Stacy,
Frederick V. Slocum,
Attorneys for Plaintiffs, Appellants.

EXHIBIT "A".

Civil Action No. 1323.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Petition to Enjoin and Set Aside an Order of the Interstate Commerce Commission.

THE ALTON RAILROAD COMPANY, et al, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and JOHN P. FLEMING, et al, *Defendants*.

OPINION.

Rendered and Filed Jan. 31, 1941.

Decided January 31, 1941.

Before SIMONS, *Circuit Judge*, MOINET and PICARD, *District Judges*.

SIMONS, *Circuit Judge:*

The petition seeks to enjoin and annul an order of the Interstate Commerce Commission granting to the defendant Fleming a certificate of public convenience and necessity under the so-called "Grandfather" clause of the Motor Carrier Act of 1935, Sec. 206a, 49 U. S. C. A. 306a (now Part II of the Interstate Commerce Act). The cause came on to be heard before a specially constituted District Court of three judges, convened in pursuance of Sec. 47, Title 28 U. S. C. A., and, as stipulated, the hearing was both preliminary and final upon the merits of the petition.

The plaintiffs are railroads engaged in interstate commerce, four of them having been interveners and protestants before the Commission. The defendants are Fleming, individually and under his assumed firm name, the Commis-

sion, and the United States. The order sought to be enjoined was entered on September 19, 1938, upon an application filed February 12, 1936, which was approved in part and in part denied, effective as of October 26, 1938. The Commission found that the applicant was engaged on June 1, 1935, and since that time, in bona fide operation as a common carrier by motor vehicle in drive-away service of new automotive vehicles, finished and unfinished, and new automotive vehicles chassis in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentuckey, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, and over irregular routes through Idaho, Illinois, Indiana, Iowa, Kansas, Nevada, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; that he was entitled to a certificate of public convenience and necessity authorized the continuance of this operation, and as incident thereto, to transport rejected vehicles or chassis from any point in the states to which service is authorized, back to Detroit.

It is stipulated that the plaintiff railroads are engaged in transporting automotive vehicles and chassis to points in the States named, and the plaintiffs base their right to contest the validity of the order upon this competitive situation, asserting that it gives them the status of parties in interest under the provisions of Sec. 205h of the Motor Carrier Act (now 205g of Part II), which recites, "any final order made under this Part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission under Part I * * *". They also justify their status as plaintiffs entitled to maintain the action by reason of the appearance of some as interveners in the proceeding before the Commission upon the authority of *Edward Hines, Trustee*, v. *U. S.*, 263 U. S., 132; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42.

The defendants deny that any of the plaintiffs are entitled to maintain this action, either by reason of their appearance in the proceeding before the Commission, or independently of that fact, and move to dismiss. Their

motion must be overruled. The phrase "party in interest", as used in the Transportation Act, has been before the court upon numerous occasions, the latest discussion being that in *L. Singer & Sons, et al.* v. *Union Pacific R. R. Co.*, — U. S., —, decided December 16, 1930. In that case, the plaintiff industry, and in its companion case, *Kansas City, Mo.*, v. *L. Singer & Sons, et al., idem*, the plaintiff municipality, were denied the right to contest an order of the Commission because such suits cannot be instituted by an individual unless he has some special and peculiar interest which may directly and materially be affected by alleged unlawful action. He must possess something more than a common concern for obedience to law. Absent such special and peculiar interest, he must, in common with the public interest, find his protection in the permission to sue granted to public authorities. If, however, special circumstances are shown, then he is a party in interest within the meaning of the statute, the court giving approval to the decision of this Court to that effect in *Detroit & M. Ry.* v. *Boyne City*, 286 Fed., 540.

The complaining railroads and the defendant Fleming are equally engaged in the transportation of automotive vehicles from Detroit to the authorized destinations, and so within the rationale of the cases distinguished in the *Singer* decision, *Texas & Pacific R. R. Co.* v. *Gulf Colorado & Santa Fe R. R. Co.*, 270 U. S., 266; *West Pacific California R. R. Co.* v. *Southern Pacific*, 284 U. S., 47, we conclude that they are possessed of that special and peculiar interest in the enforcement of the challenged order that gives to them the status of plaintiffs within the meaning of the statute. This being so, we need not inquire whether their right to maintain the action is also supported by the fact that some of them appeared as parties in the proceeding before the Commission.

Section 206a of the Motor Carrier Act, provides, except as elsewhere authorized, that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway * * * unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." The proviso in the Section referred to

as the "Grandfather" clause, declares that if any such carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made", and "has so operated since that time, except * * * as to interruptions of service over which the applicant had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation". Pending determination of the application the applicant is authorized to continue operations. Section 208a provides that the certificate issued under Sec. 206a shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate".

The plaintiffs assail the order of the Commission as not being supported by substantial evidence of actual operation in much of the territory granted, on the ground that Fleming's deliveries were, in many of the States, negligible and intermittent, so as not to qualify him for a certificate under the "Grandfather" clause. They also complain that the Commission misconstrued the statute by interpreting "territory" as synonymous with "state", and so exceeded its authority in granting rights for operation to all points in a number of the States when the proofs showed that deliveries had been made but to one or to several points of destination in such States. Finally, they challenge the finding that Fleming was in "bona fide" operation in all of the territory, on the ground that in a number of the authorized States he had not fully complied with State law governing the operation of motor carriers within or through such States.

The Commission found (MC 48654) that Fleming had commenced operations during the early part of 1933, from which time to July, 1936, he had transported or participated in the transportation of more than 2100 vehicles, the shipments consisting of from 1 to 16 vehicles, although shipments of 2 and 4 vehicles exceeded shipments of other quantities; that he had also transported used cars between various points in the States covered by his application, and had

returned certain new cars, refused by the distributor or dealer, to Detroit, as a necessary incident to his business. In each of the States, save one, in which deliveries are authorized by the order, there had been shipments prior to the crucial date, June 1, 1935, and shipments thereafter prior to the date of the hearing. As to many of the States, the applicant had transported numerous shipments to the points served.

The statute is silent upon the degree of operation necessary to qualify the applicant for a certificate, under the "Grandfather" clause. Subject to the condition that the operation must be bona fide, hereinafter discussed, decision upon the substantial character of the applicant's business must be considered as having been committed to the judgment of the administrative agency entrusted by the Act with regulation and enforcement. The Commission found that Fleming was engaged in a highly specialized transportation service with few direct competitors, and that but 7% of all new automobiles sold in 24 western States were being transported by the method in which the applicant was engaged. In our application of the now familiar rules governing review of factual findings by administrative bodies, we are unable to say that the findings of the Commission are unsupported by substantial evidence, and in this respect they will be sustained, except as to operation in the State of Arkansas. The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that State his operations had been abandoned. *U. S.* v. *Maher*, 307 U. S. 148.

As a basis for granting to Fleming authority to serve all points in a state, though actual operation during the critical period had been but to a limited number of distribution points in such state, the Commission relied upon evidence showing that distribution points are constantly being shifted from the standpoint of a state-wide area; that dealers accounts are frequently changed, and that sales volume at given points may show rapid increases or decreases. The result of a shift in distribution point would leave the applicant without authority to serve an account

theretofore served, and render the carrier unable to continue an operation which he had been conducting. It took into consideration the nature and characteristics of this transportation service as highly specialized, the type of operation engaged in, the infrequency of the demands of consignees, and concluded that the record was convincing that the applicant's operations had been and would continue to be irregular in nature because of the conditions under which he might secure traffic, and that the same proof, with respect to territory served, that might be required of a general commodity hauler, could not be imposed upon him, nor could his operations be confined within the same definite limits.

The statute neither expressly nor by implication gives connotation to the phrase "within the territory". No standard is found whereby the area is to be delimited, and the plaintiffs had been unable to suggest criteria by which the Commission must be governed. It is general knowledge that in many industries distribution points are determined for areas coextensive with state boundaries. The Commission had made exhaustive studies of motor carrier transportation services and it must be assumed it has become expert in that field. We find no error in its findings in this respect.

The plaintiffs contend that Fleming's operations were not "bona fide" in character because he had failed to secure certificates from each of the states through or into which he conducted operations. Fleming had, however, made inquiry as to certificate requirements, some of which were still pending at the time of the hearing. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas, were introduced, and the proofs showed that he held permits issued by the States of Oregon and Nebraska. In a few of the states, notably Missouri, there may have been temporary, inadvertent, or purely technical operation without sanction of local law. The Commission found, notwithstanding, that he had been engaged on June 1, 1935, and since, in bona fide operation within or through each of the states authorized.

This finding is attacked upon the authority of *McDonald* v. *Thompson*, 305 U. S., 263. While that case had not been decided when the findings of the Commission were made and its order entered, it was made the basis of a petition for rehearing before the Commission, which was denied. McDonald v. Thompson holds that the expression "in bona fide operation" suggests "absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire". It then reaches the conclusion that, "plainly the proviso does not extend to one operating as a common carrier on the public highways of the state in defiance of its laws."

In McDonald v. Thompson the Supreme Court was not called upon to set aside a finding of the Interstate Commerce Commission, that the applicant for a certificate of convenience and necessity had been in bona fide operation before and since the critical date, nor to determine whether the finding of the Commission had been based upon substantial evidence. That such finding is one of fact is indicated by the language of the court in *U. S.* v. *Maher*, supra, "Whether an applicant seeking exemption had, in fact, been in operation within the immunizing period of the statute, was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission". Granted that the interpretation of the phrase "in bona fide operation" is a question of law, we find nothing in McDonald v. Thompson to indicate that an applicant, who inadvertently or temporarily made deliveries into or operated through a state without its express authority having previously been granted, is operating as a common carrier on its public highways in defiance of its laws, when the state itself had not sought to exclude such carrier. McDonald had been refused the use of the highways of Texas by its Railroad Commission and its courts, but denied that Texas law applied, and set up as authority his application, under the Motor Carrier Act, and the provision therein that, pending action upon the application, his operations might pro-

ceed. Fleming's operations were in recognition of state law, and his applications to state authority and his inquiries as to the requirements of the several states were obviously so considered by the Commission. In any event there is no evidence that his inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority.

The Commission had in mind the confusion that existed with respect to the requirements imposed by the laws of the various states, and the regulations of its public Commissions. It concluded, with reference to the Missouri situation, "compliance by applicant with the applicable laws of Missouri is a matter that rests between applicant and the state authorities". Another consideration seems also important. Where Fleming had been operating with the express or implied consent of state officials while endeavoring to ascertain the formalities to be observed to secure a permit, the present denial of a certificate, by the Commission, to operate in such states under the "Grandfather" clause, would, if, thereafter, he satisfied state authority for necessary local authorization, be conclusive. As we read it, nothing in *McDonald* v. *Thompson* compels the conclusion that a finding by the Commission of bona fide operation must be set aside when such finding is based upon substantial evidence and there is no proof of the defiance of local law.

The order of the Commission will be modified by excluding from the certificate authorized thereby, authority to operate to the State of Arkansas, and as so modified the order of the Commission is sustained. The findings of the Commission and its conclusions of law, insofar as they bear upon issues herein discussed, are adopted as the findings and conclusions of the court, except as modified.

CHARLES C. SIMONS,
United States Circuit Judge,
EDWARD J. MOINET,
United States District Judge,
FRANK A. PICARD,
United States District Judge.

No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLANTS,

v.

THE ALTON RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Eastern District of Michigan, Southern Division

CIVIL ACTION NO. 1323

THE ALTON RAILROAD COMPANY, ET AL.,
PLAINTIFFS

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, DEFENDANTS

JURISDICTIONAL STATEMENT BY THE DEFENDANT-CROSS-APPELLANTS UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

(Filed June 6, 1941)

The defendant-cross-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon these defendants' cross-appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed:

A. STATUTORY PROVISIONS

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, Section 210, 36 Stat. 1150; as amended

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by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, Section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38, Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, Section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Section 35, 31 Stat. 85; April 30, 1900, c. 339, Section 86, 31 Stat. 158; March 3, 1909, c. 269, Section 1, 35 Stat. 838; March 3, 1911, c. 231, Sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, Section 2, 38 Stat. 804; February 13, 1925, c. 229, Section 1, 43 Stat. 938).

B. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED

The decree sought to be reviewed was entered on April 7, 1941. The petition for cross-appeal was presented on May —, 1941, by these defendants, together with an assignment of errors.

C. NATURE OF CAUSE AND RULINGS BELOW

This is a cross-appeal from a decree of the District Court of the United States for the Eastern

District of Michigan, Southern Division, entered April 7, 1941, and from the portion thereof which grants in part plaintiffs' complaint and which sets aside and annuls that portion of the Commission's report in the proceeding hereinafter described which authorizes operations by defendant John P. Fleming from Detroit, Mich., to points within the State of Arkansas, said decree having been made in a suit brought by the above-named plaintiffs under and pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28, U. S. C.

The plaintiffs' complaint prayed that the said District Court enjoin, set aside, and annul an order of the Interstate Commerce Commission entered September 19, 1938, in proceedings entitled *John P. Fleming Common Carrier Application*, No. MC-48654 (reported 8 M. C. C. 469), in which report and order the Commission found that said applicant had established his right to a certificate to operate as a common carrier under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935. The complaint filed in the District Court alleged, among other things, that the Commission's said order was erroneous in law and that in the light of the facts shown in evidence before the Commission that plaintiff was and is entitled to have no certificate whatever issued under and in pursuance to the "grandfather" provisions of said Act, and that by reason of the Commission's

said report and order the plaintiffs would suffer great and irreparable injury to their business.

The case was heard upon the merits before a Court composed of three judges organized pursuant to U. S. C., Title 28, Section 47 (the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220). The defendants, the United States, the Interstate Commerce Commission, and John P. Fleming, in their answers raised the issue that the plaintiffs were without standing to institute and maintain said suit to set aside the Commission's report and order and also the issue that the Commission's report and order were within the Commission's jurisdiction in accordance with law, supported by substantial evidence and in all respects lawful. A transcript of all the evidence received before the Commission, duly certified by its Secretary, was received in evidence. Thereafter, on April 7, 1941, the Court handed down its opinion and entered its decree holding that the prayer of the complaint should be granted to the extent of excluding from the Commission's report and order issued in said proceeding the authority therein granted to defendant John P. Fleming to transport property from Detroit, Mich., on the one hand, to any point in the State of Arkansas, on the other hand, and further holding that the defendant John P. Fleming be permanently enjoined from so operating under the authority of said report and order. In all other

respects said report and order were sustained and the relief asked in plaintiffs' complaint was denied.

The plaintiffs have taken their appeal from the portion of the Court's decree which sustains the Commission's report and order and defendants have taken a cross-appeal from the portion of the Court's decree which modifies and annuls the Commission's report and order relative to operations in Arkansas as aforesaid and enjoins Defendant Fleming from so operating thereunder.

The questions presented by this appeal are substantial. They involve the question of the standing of the plaintiffs which are steam railroads transporting automobiles in railway cars to bring suit to set aside the report and order of the Commission under which defendant Fleming would transport automobiles by the so-called "driveaway" method, and the question of whether the plaintiffs have any interest in the order of the Commission by virtue of any actual or substantial competition between the two forms of transportation. The questions also involve the duties and functions of the District Court with regard to the weighing of the evidence heard by the Interstate Commerce Commission in proceedings based upon applications for certificates of convenience and necessity for common carriers under the so-called "grandfather" clause of Section 206 of the Motor Carrier Act, 1935, and the validity of the action of the Commission in granting such application.

D. CASES SUSTAINING THE SUPREME COURT'S JURISDICTION ON APPEAL

Hines, Trustees, v. *United States,* 263 U. S. 143.

Piedmont & Northern R. Co. v. *United States,* 280 U. S. 469.

Sprunt & Son v. *United States,* 281 U. S. 249.

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United States v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454.

Florida v. *United States,* 282 U. S. 194.

Beaumont, Sour Lake & Western Ry. Co. v. *United States,* 282 U. S. 74.

Ann Arbor Railroad Co. v. *United States,* 281 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1.

Interstate Commerce Commission v. *Union Pacific Ry. Co.,* 222 U. S. 541.

United States v. *Maher,* 307 U. S. 148.

E. DECREE AND OPINION OF THE DISTRICT COURT

Appended to this statement is a copy of the opinion of the District Court which, the Court states, includes its findings of fact and conclusions of law, and a copy of the decree of said Court sought in this cross-appeal to be reviewed in part.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the cross-appeal.

Dated June 6th, 1941.

Respectfully submitted.

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Attorney for John P. Fleming.

(Copy of judgment and decree and copy of opinion of court on petition to enjoin and set aside an order of the Interstate Commerce Commission appear in record on direct appeal.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 110

THE ALTON RAILROAD COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, AN INDIVIDUAL DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

APPELLANTS' BRIEF.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

APPELLANTS' BRIEF.

Opinions Below.

The Opinion of the District Court appears in 36 F. Supp. 898 and R. 29. The Report of the Interstate Commerce Commission is in 8 M. C. C. 469 and R. 8.

Jurisdictional Statement.

Statement as to jurisdiction was filed. and probable jurisdiction was noted on October 13, 1941.

This is an action to enjoin and annul an order of the Interstate Commerce Commission, tried before a United States District Court of three judges. 28 U. S. C. A. 41

(28), 44, 47, 47a. It comes to the Supreme Court by direct appeal. 28 U. S. C. A. 345 (4). The District Court held it had jurisdiction, held that plaintiffs (appellants here) were proper parties to maintain the action, granted a part, and denied the remainder, of the relief asked by appellants (R. 29-37). This appeal is from the part of the final decree denying relief (R. 37, 42).

Statement of the Case.

Appellants, seventy-one railroads, sued appellees to enjoin and annul an order of the Commission made under the so-called "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935, now 206 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 306 (a).[1] This order had its origin in the following circumstances.

Appellee John P. Fleming, doing business as John P. Fleming Driveaway Service, filed application (R. 46) with the Interstate Commerce Commission on February 12, 1936, for authority under the "grandfather" clause to continue operation as a common carrier by motor vehicle in driveaway service of automobiles, trucks, chassis, unfinished automobiles, and all other automotive vehicles, between points in various states over irregular routes. The relevant part of Section 206 (a) is the following:

> "Sec. 206 (a). (Except as otherwise provided in this section and in section 210a,)[2] no common carrier

1. After this action was begun the Transportation Act of (September 18) 1940 became effective. 54 Stat. 899. This Act amended some of the sections of the Motor Carrier Act, 1935 (49 U. S. C. A. 301-327), and of Part I of the Interstate Commerce Act (49 U. S. C. A. 1-27), and created a new Part III of the Interstate Commerce Act to regulate water carriers (54 Stat. 929, 49 U. S. C. A. 901-923). This new legislation made some changes in wording and section numbering in some of the provisions applicable to this case, which will be noticed in the course of the argument. The Motor Carrier Act, 1935, was originally also denominated "Part II" of the Interstate Commerce Act (see 49 Stat. 543), but by the Act of 1940 the appellation "Motor Carrier Act, 1935" was amended out and this Act is now designated only Part II of the Interstate Commerce Act. 54 Stat. 919. In this brief both the old and the new terminology and numbering will be referred to as proper understanding may require.

2. Added June 29, 1938. 52 Stat. 1238.

by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time,* or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation (and has so operated since that time),[3] except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, *the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation,* and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful." (Emphasis supplied.)

Hearing on the application was held before an examiner on July 23, 1936. All of the appellants except four[4] ap-

3. Added September 18, 1940. 54 Stat. 923.

4. The four which did not appear before the Commission are: Detroit, Toledo and Ironton Railroad Company; C. E. Denny and John A. Haddon, Trustees for Erie Railroad Company; Chicago and Erie Railroad Company; and The Colorado and Southern Railroad Company.

peared as protestants (R. 4, 19, 24, 26, 62-67). The examiner's report and recommended order was filed September 10, 1937 (R. 68), and appellants filed exceptions to it (R. 78). The Commission, by Division 5, filed its report, 8 M. C. C. 469, and order, September 19, 1938 (R. 8). Thereafter appellants filed two successive petitions for reconsideration by the entire Commission of the report and order of Division 5, which were overruled, the last on March 6, 1939 (R. 79, 4, 19, 23, 26). Appellants commenced this action July 14, 1939 (R. 3). Trial was had on November 26, 1940, and final decree was entered April 7, 1941 (R. 36). This appeal was docketed in this Court May 29, 1941.

The authority granted appellee Fleming by the Commission is the following (R. 16):

> "We find that applicant was engaged, on June 1, 1935, and has been so engaged since that time, in bona fide operation as a common carrier by motor vehicle in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis, in interstate or foreign commerce, from Detroit, Michigan, on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation * * *."

The District Court modified the Commission's report and order by excluding therefrom the right to transport property from Detroit to Arkansas (R. 36). In all other respects the Commission's report and order were sustained, and the Court adopted as its own "the findings of the Commission and its conclusions of law * * * except as modified" (R. 35).

One or more of the appellants are carrying, or participating in the carriage of, the commodities Fleming is authorized to carry, as common carriers of property in interstate commerce, from Detroit, Michigan, for delivery to all railroad stations and other points served by appellants in all of the states Fleming is authorized to serve, and have been so engaged for more than five years, and the amount of such traffic is substantial (R. 118, 43).

There is no conflict of evidence or dispute as to any facts. Appellants attack the Commission's order on two general grounds: (1) that the undisputed evidence is not sufficient to sustain it, and (2) that it is the result of and dependent upon erroneous construction of the applicable statutes. The specific errors in the action of the Commission and the decree of the District Court are stated in the assignment of errors, which is based upon the errors alleged in appellants' complaint in the District Court (R. 5) and the exceptions filed before the Commission (R. 78-82).

A certified copy of the entire record before the Commission was received in evidence in the District Court. This record is incorporated in the printed Record in this Court, except that part of the oral testimony is reduced to narrative form and some of the exhibits are condensed and rearranged for better understanding of the material parts, in accordance with Rules 8, #2, and 10, #2, of this Court. At the request of counsel for appellees we stipulated that the original record received in the District Court could be transmitted to this Court.

Assignment of Errors.

For their assignment of errors plaintiffs, appellants, say the District Court erred in entering its opinion, findings, and judgment and decree in this action, in the following respects:

1.

In holding that there was sufficient evidence before the Interstate Commerce Commission to sustain its report and order, and its findings therein, that defendant, appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service:

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming:

(b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

2.

In holding that the Interstate Commerce Commission construed correctly the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act) including the following phrase in Section 206 (a), 49 U. S. C. A. 306 (a):

> "* * * in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * *."

and in holding that the Commission correctly decided in its construction of said Act that appellee, John P. Fleming, doing business as John P. Fleming Driveaway Service:

(a) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to all points in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand:

(b) was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and has so operated since that time, from Detroit, Michigan, on the one hand, to any point in Alabama, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, on the other hand, other than the following: Birmingham, Alabama; Atlanta and Savannah, Georgia; Williamsburg, Kentucky; Asheville and Charlotte, North Carolina; Columbia and Hartsville, South Carolina; and Knoxville and Chattanooga, Tennessee.

3.

In sustaining the conclusion of the Interstate Commerce Commission that because (8 M. C. C. p. 472):

> "Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in * * * Alabama;

> shipments to two points in each of the States of California * * * and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia,"

the said defendant, appellee, John P. Fleming, was on June 1, 1935, in bona fide operation as a common carried by motor vehicle from Detroit, Michigan, to all points in said states.

4.

In sustaining the findings and conclusions of the Interstate Commerce Commission that transportation by the said defendant, appellee, John P. Fleming, of the few automotive vehicles shown by the evidence to have been transported by him on a few occasions to a few points in Washington, Oregon, California, and Texas, constituted bona fide operation as a common carrier by motor vehicle either on or after June 1, 1935, to any points in said states.

5.

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was operating only as a contract carrier by motor vehicle on June 1, 1935, in Oregon, and has so operated there since that time, and therefore was not then and there operating as a common carrier by motor vehicle.

6.

In failing to hold that the evidence before the Interstate Commerce Commission showed that said defendant, appellee, John P. Fleming, was not in bona fide operation as a common carrier by motor vehicle on June 1, 1935, and since that time, in, or upon the highways of Oregon, Ne-

braska, Missouri, Texas, and Ohio, because he was during such time operating upon the public highways of such states in violation of their laws regulating and taxing the operations of motor vehicles upon such highways.

7.

In failing to hold that if said appellee, Fleming, was in operation on June 1, 1935, and since that time, in any territory within which is included, either as the whole or a part thereof, Oregon, Texas, Nebraska, Missouri, or Ohio, said appellee was not in bona fide operation within said territory because he was operating in violation of the laws of said states.

8.

In adopting as its own, except to the extent modified in the opinion and decree, the findings of fact of the Interstate Commerce Commission.

9.

In adopting as its own, except to the extent modified in the opinion and decree, the conclusions of law of the Interstate Commerce Commission.

10.

Insofar as it held that the question, whether violation of state laws by a motor carrier constitutes lack of bona fide operation, is a question of fact for the determination of the Interstate Commerce Commission.

11.

In holding, either as a finding of fact or as a conclusion of law, or both, that any violations of state laws by appellee Fleming was temporary, inadvertent, or technical; and in failing to hold that such violations were intentional.

12.

In finding that four of the plaintiffs were interveners and protestants before the Interstate Commerce Commission, whereas the undisputed evidence shows that *all except four* of the plaintiffs were interveners and protestants before the Commission. (It is believed that the Court's statement and finding here excepted to is an inadvertence.)

SUMMARY OF ARGUMENT.

1.

Appellants are parties in interest within Sec. 205 (g) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 305 (g), and as such are proper parties to maintain this action.

2.

The evidence, all undisputed, is insufficient to support the Commission's conclusion that Fleming is entitled to the "grandfather" rights authorized, and in reaching its conclusions the Commission erroneously construed the applicable law. The Commission erred (a) in authorizing Fleming to operate to any point in the western states, and (b) in authorizing him to operate to all points in any of the states.

(A) Summary of this division.

(B) The Commission erred in finding that Fleming established "grandfather" rights to any point in Washington, Oregon, and California.

(C) The Commission erred in finding that Fleming established "grandfather" rights to all points in Washington, Oregon, and California, by his operations to those states.

(D) No special exceptions from the general rule of the "grandfather" clause should be permitted with respect to driveaway operations.

(E) "Territory" does not mean state.

(F) The phrase in Section 206 (a), 49 U. S. C. A. 306 (a), "within the territory for which application is made" does not mean "anywhere-for-hire."

(G) Summary of evidence with respect to other states: Arkansas, Texas, Tennessee, Kentucky, Alabama, Georgia, North Carolina, South Carolina.

3.

Appellee Fleming was operating in certain territory in intentional violation of law before and after June 1, 1935, and the Commission therefore erred in holding that he was in bona fide operation in that territory.

(A) Fleming held a contract carrier permit issued by the State of Oregon and was a contract carrier there and not a common carrier during the "grandfather" period.

(B) While operating motor vehicles through Nebraska appellee Fleming claimed that the vehicles were his own in order to escape payment of license fees.

ARGUMENT.

1.

APPELLANTS ARE PARTIES IN INTEREST WITHIN SEC. 205 (G) OF PART II OF THE INTERSTATE COMMERCE ACT, 49 U. S. C. A. 305 (G), AND AS SUCH ARE PROPER PARTIES TO MAINTAIN THIS ACTION.

In the District Court appellees urged that appellants were not proper parties to maintain this action. The Court held appellants were entitled to sue. As appellees have brought this question before the Court by cross-appeal, it may be appropriate to cover it at the outset of our case.

At the time of its enactment the Motor Carrier Act, 1935, was denominated "Part II" of the Interstate Commerce Act, and the original Act was named "Part I." 49 Stat. 543. By the Transportation Act of (September 18) 1940, the name "Motor Carrier Act" was dropped and this Act as amended remains "Part II of the Interstate Commerce Act." 54 Stat. 919. The sections of both Part I and Part II which we are about to cite were not amended by the Act of 1940 except for renumbering and relettering.

The order of the Commission which appellants attack was made under Section 206 (a) of the Motor Carrier Act, 1935, formerly and now Part II of the Interstate Commerce Act. Section 205 (h) of the Motor Carrier Act, 1935 (now 205 (g) of Part II), provides in part 49 Stat. 550, 54 Stat. 922; 49 U. S. C. A. 305 (g)):

> "Any final order made under this part shall be subject to the same right of relief in court by *any party in interest* as is now provided in respect to orders of the Commission under Part I * * *." (Emphasis supplied.)

It is our position that we are within the description, "*any party in interest*," and that as such we are entitled to maintain this action. We look to "Part I" of the Interstate Commerce Act, and decisions of this Court construing it, to ascertain "the same right of relief in court—as is now provided in respect to orders of the Commission under Part I."

Under the decisions of this Court prior to the enactment (in 1935) of Section 205 (g), a competing carrier had a very broad and comprehensive right to sue to set aside an order of the Commission, made under Part I of the Interstate Commerce Act, granting a certificate of convenience and necessity to a competitor. We believe that when Congress enacted Section 205 (g) it showed its intent to bring into Part II the same right that existed in this respect as to Part I; and the District Court agreed with us.

Paragraph (18) of Section 1 of the Interstate Commerce Act (49 U. S. C. A. 1 (18)) forbids any railroad to build or operate or engage in transportation over any line of railroad until the Interstate Commerce Commission shall have authorized it to do so. Paragraph (20) of the same section provides in part:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest* • • •." (Emphasis supplied.)

In *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, it was held that the foregoing paragraph (20) authorized a carrier not operating a railroad and not subject to the Interstate Commerce Act to maintain an action in a district court of three judges to annul an

order of the Interstate Commerce Commission granting a certificate of public convenience and necessity to a railroad. The Court said (pp. 391-392):

> "The right of the appellant Ferry Company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, Sec. 1. '*Any party in interest*' may institute a suit to enjoin a proposed construction, *operation*, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In the absence of such certificate the doing of any of these things is declared to be unlawful—a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. *The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence or other reason. An invalid certificate would leave the situation as though none had issued. Chicago, Rock Island and Pacific Railway* v. *United States*, 274 U. S. 29." (Emphasis supplied.)

The foregoing case is specific authority that appellants are parties "in interest" to maintain this action. It is to be particularly noted that in the Interstate Commerce Act the identical phrase, "any party in interest," is used in section 1 (20) of Part I and section 205 (g) of Part II, 49 U. S. C. A. 1 (20), 305 (g). It seems obvious that the rights of a "party in interest" under 1 (20) are at least co-equal under 205 (g).

The construction by the courts of the meaning of "any party in interest" in paragraph (20) of Section 1 of the Interstate Commerce Act demonstrates that appellants are "parties in interest" within the meaning of Section 205 (g).

In *Claiborne-Annapolis Ferry Co.* v. *United States*, *supra*, (285 U. S. 382) the Court also said (p. 390):

> "Considering *Texas* v. *Eastern Texas R. Co.*, 258

> U. S. 204, *Colorado* v. *United States*, 271 U. S. 153, *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, and *Transit Commission* v. *United States*, 284 U. S. 360, it must be held that appellant is a 'party in interest' within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation."

In *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U. S. 47, cited in the above passage, the carrier held to be a "party in interest" had a case not as strong as ours. Western Pacific applied to the Interstate Commerce Commission for authority to build a line of railroad approximately twenty-five miles long, and made surveys for the line. Thereafter Southern Pacific commenced the construction of a line into the same territory without applying to the Commission for authority. Western Pacific sued in Federal Court to enjoin Southern Pacific from continuing such construction. The Commission had not acted yet on Western Pacific's application to it for authority to build a line. Southern Pacific in its defense to this suit urged that Western Pacific was not a "party in interest" within the meaning of Section 1, paragraph (20) of the Interstate Commerce Act (49 U. S. C. A. 1 (20)).

This Court held that Western Pacific was a "party in interest" and could maintain the suit, saying (pp. 51-52):

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massa-*

chusetts v. *Mellon*, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a 'party in interest' within intendment of the Act."

Before that passage the Court had said, in explaining the purpose of the statute (pp. 50-51):

"Paragraphs 18 to 22, *supra*, were considered here in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: 'It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public, that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.'"

It will be observed that plaintiff in that case was not as yet carrying any traffic, never had carried any traffic, from the territory into which it desired to build a line. It had applied for but had not received authority to construct the line. Yet it was held to be "a party in interest" within the meaning of the above set out statutory provisions and therefore to have authority to maintain the suit. And the object of the suit in that case was the same as in our instant case by virtue of the holding in *Claiborne-Annapolis Ferry Co. v. United States, supra*, that "an invalid certificate would leave the situation as though none had issued."

It will be noticed that in the above case the holding of the court is that, by virtue of paragraph (20) of Section 1 of the Interstate Commerce Act, it is not necessary for a plaintiff, in a case of this character, to have "some clear legal right for which it may seek protection under the rules commonly accepted by courts of equity." Rather, the court held that one who was only a prospective carrier, one who had no traffic in fact and had no legal right to build rails to go after traffic, was a "party in interest."

Appellants are competitors with Fleming for automobile traffic. Appellants alleged in their complaint in District Court (R. 4-5), and it was stipulated at the trial (R. 118, 43), that appellants are carrying or participating in the carriage of automobiles from Detroit to all of the states Fleming is authorized to serve. The Interstate Commerce Commission has frequently pointed to the fact that motor carriers are taking much traffic from the railroads and that keen competition exists between them.[5] The Commis-

5. 52d Annual Report of the Interstate Commerce Commission, Nov. 1, 1938, p. 17: "As above stated, we regard the extraordinary increase in transportation competition as a primary cause of railroad ills. Whether it realizes it or not, the country has in fact experienced a transportation revolution in a very short space of time. The automotive highway vehicle has been the principal factor in this revolution. In the carriage of persons, it is now by far the most important means of transportation, and in the carriage of property it is growing in importance every day."
54th Annual Report, Nov. 1, 1940, p. 27: "Motor carriers * * * are strong competitors of the railways."

sion is now engaged in an investigation of rates charged by railroads and motor carriers for the transportation of new automobiles, one part of which is "the relation, if any there should be, of rates and charges as between said respective forms of transportation."[6] There has been a steady decline in the number of automobiles shipped by rail over the past twelve years. In 1929 the railroads originated as freight 53 per cent of all of the new automobiles manufactured in the United States, while in 1939 this percentage had declined to 37.3.[7] The Commission has "in numerous proceedings * * * granted certificates authorizing the transportation of automobiles by the drive-

6. 54th Annual Report, Nov. 1, 1940, pp. 41-42:
"Concerning the lawfulness of the rates, charges, rules, regulations, and practices of common carriers by railroad, common carriers by motor vehicle, including the so-called haul-away, drive-away, and tow-bar methods, contract carriers by motor vehicle, including the so-called haul-away, drive-away, and tow-bar methods, and common carriers by water for the transportation in interstate or foreign commerce (insofar as such transportation is subject to the provisions of parts I and II of the Interstate Commerce Act) of new automobiles, set up (not including shipments by rail or water moving on less-than-carload rates), from and to all points in the continental United States, other than the territory of Alaska, with a view to determining and prescribing just and reasonable rates, charges, rules, regulations, and practices thereafter to be observed, including minimum rates and charges and the relation, if any there should be, of rates and charges as between the said respective forms of transportation, and making such further order, or orders, or taking such other action in the premises as may be warranted by the record."

7.

Year	Number of Passenger Automobiles manufactured in the United States	Passenger automobile traffic originated on railroads in the United States		Per cent Col. (3) of Col. (1)
		Number of Carloads	Number of Automobiles	
	(1)	(2)	(3)	
1929	4,362,215	617,129	2,314,234	53
1931	1,911,717	242,489	909,334	47.5
1933	1,533,566	169,107	634,151	41.3
1935	3,211,734	357,808	1,341,780	41.7
1937	3,847,800	429,266	1,609,748	41.8
1939	2,822,261	281,200	1,054,500	37.3

Col. (1): U. S. Census of Manufactures: 1931 Year Book, p. 1045; 1937 Year Book, part 1, p. 1206; 1939 Preliminary Report, November 13, 1940, Industry No. 1810.

Col. (2): I. C. C. Annual Commodity Statistics, 30100, 32100, 34100, 36100, 38100, and 40100.

Col. (3): Computed upon basis of 3.75 automobiles per loaded railroad car.

away method or by the truck-away method.'"[8] In view of all this it would be closing eyes to reality to say that appellants are not a "party in interest."

The fact that appellants are railroads and appellee Fleming a motor carrier does not make appellants any the less a "party in interest"; it does not prevent application of Section 205 (g) to them. This section is general in terms. It accords certain rights to "*any* party in interest," not to "any interested motor carrier." The very generality of the section itself and the generality of its reference to Part I brings a competing carrier within its scope, albeit a railroad. There is nothing in the section which would authorize limiting "any party in interest" to a motor carrier. Had Congress intended to confine the "right of relief in court" to the applicant for a certificate, or to the governmental agencies named in Section 1 (20), it would have done so. These agencies are not even named in Section 205 (g).

The Court recently gave attention to the construction of "any party in interest" in Section 1 (20) in *L. Singer & Sons* v. *Union Pacific Railroad Company*, 311 U. S. 295. There is nothing in that case contrary to our position and much that supports us. The Court's opinion states:

> "An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See *Detroit & M. R. Co.* v. *Boyne City, G. & A. R. Co.* (D. C.), 286 F. 540. If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute."

The *Boyne City* case, in which a railroad was held a "party in interest" to sue another railroad, supports our position, and was cited by the District Court (R. 31).

In the concurring opinion of Mr. Justice Frankfurter it is said (pp. 306-307):

> "Who then is a 'party in interest'? As a part of

8. *West Penn Forwarding Company Common Carrier Application*, 29 M. C. C. 201, 204.

the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a 'party in interest' to effectuate the railroad policy introduced by the licensing system of the Transportation Act. *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277; *Western P. California R. Co.* v. *Southern P. Co.*, 284 U. S. 47. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. Los Angeles Passenger Terminal Cases, 100 Inters. Com. Rep. (F.) 421, 142 Inters. Com. Rep. (F.) 489; *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 283 U. S. 380, 393, 394, may perhaps be deemed a 'party in interest' in the further pursuit of claims before a court after adverse action by the Commission. Compare *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, and *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470."

In that and in the Court's opinion there is implicit recognition of the rule of *Claiborne-Annapolis Ferry Co.* v. *United States supra* (285 U. S. 382), that a competing carrier is a "party in interest." Besides that, sixty-seven of the appellants, all but four, were protestants before the Commission and were "treated by it as a party to the litigation."

The dissent written by the present Chief Justice recognizes, we think, that a competing carrier is "party in interest", by including within that phrase an affected shipper or receiver.

2.

THE EVIDENCE, ALL UNDISPUTED, IS INSUFFICIENT TO SUPPORT THE COMMISSION'S CONCLUSION THAT FLEMING IS ENTITLED TO THE "GRANDFATHER" RIGHTS AUTHORIZED, AND IN REACHING ITS CONCLUSIONS THE COMMISSION ERRONEOUSLY CONSTRUED THE APPLICABLE LAW. THE COMMISSION ERRED (a) IN AUTHORIZING FLEMING TO OPERATE TO ANY POINT IN THE WESTERN STATES, AND (b) IN AUTHORIZING HIM TO OPERATE TO ALL POINTS IN ANY OF THE STATES.

(A) SUMMARY OF THIS DIVISION.

We submit in this division that the undisputed evidence is insufficient to support the Commission's order, and that the order is the result of and dependent upon erroneous construction of the statutes. Our argument is in two subdivisions, stated alternatively. As each subdivision concerns the same evidence and to a large extent the same principles of law they are considered together.

The Commission authorized Fleming to serve from Detroit

> "* * * all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Texas, and Washington" (R. 16).

Summarizing the evidence upon which its order is based the Commission said (8 M. C. C. 469, 472; R. 12):

> "Briefly summarized, applicant, between January 1, 1934, and June 1, 1935, transported shipments of new automotive vehicles to one point in each of the States of Arkansas and Alabama; shipments to two points in each of the States of California, * * * and Tennessee; shipments to three points in Washington, Oregon, Kentucky, and North Carolina; shipments to four points in Texas; shipments to five points in South Carolina, and to seven points in Georgia.
>
> "As to the States other than California, * * * Arkansas, Texas, Oregon, and Washington, applicant transported numerous shipments to the points served."

There are serious defects in this finding and the conclusions which the Commission drew from it, in addition to those apparent on its face. From early in 1934 to July 23, 1936, the date of the hearing, there was only one shipment to some points, and not more than four shipments to any point, in all of the western and some of the eastern states. Such shipments consisted of from one to a few vehicles. Some points were served only before June 1, 1935, and others only after that date, so that in some large areas the number of points served both before and after June 1, 1935, is even less than the number stated in the Commission's above recited summary.

The Commission itself gave voice to doubt, saying (8 M. C. C. p. 472; R. 13):

> "It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the States served."

We urge, first, that the Commission erred in holding that Fleming established "grandfather" rights to *any* point in those states, except for the qualification stated in our assignment of error 1 (b) (R. 38). Second. If we are mistaken in our first contention, then we say that the Commission erred in holding that the service shown to have been made to one or a few points in a state established "grandfather" rights to serve *all* points in the state.

The Commission considered the evidence state by state. We will group various states together, first taking up Washington, Oregon, and California, and in discussing these three will present our general argument. The evidence respecting the other states will thereafter be stated without further argument.

(B) THE COMMISSION ERRED IN FINDING THAT FLEMING ESTABLISHED "GRANDFATHER" RIGHTS TO ANY POINT IN WASHINGTON, OREGON, AND CALIFORNIA.

Fleming's application is under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935 (49 U. S. C. A. 306 (a)), now Part II of the Interstate Commerce Act; so the purpose of the evidence submitted at the hearing, and our purpose in examining the evidence now, is to ascertain what Fleming was doing on June 1, 1935, and has been doing since that time. If he—

> "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time" (49 U. S. C. A. 306 (a)),

he was entitled to a certificate. If he was not so operating on June 1, 1935, or has not so operated since that time, then his application for "grandfather" rights must be denied, *United States* v. *Maher*, 307 U. S. 148. "Operation" means "actual rather than potential service." *McDonald* v. *Thompson*, 305 U. S. 263, 266.

For the purpose of this division of the argument the constructions of "common carrier" and "territory" are important. "Common carrier" was defined in Section 203 (a) (14) of the Motor Carrier Act, 1935, as follows (49 Stat. 544):

> "The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

This definition was amended by the Transportation Act of (September 18) 1940 to read (54 Stat. 920):

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

Section 208 (a) provides (49 U. S. C. A. 308 (a)):

> "Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate * * *."

It is our position that the Commission erroneously construed "common carrier" and "territory," and that the evidence (all undisputed) was insufficient to show that Fleming was operating as a "common carrier" in the "territory" the Commission's order authorizes him to serve.

Attached to Fleming's application were shipping bills showing service to various points, to support his claim of service during the "grandfather" period, and these were received in evidence (R. 92). The application states that these bills were "picked at random" (R. 56). During the hearing it was agreed by counsel for all parties and by the examiner that Fleming should produce a list of consignees served by him in the various states and the dates he began to serve them and file it with the Commission within ten days (R. 104-105). This list was filed August 16, 1936, and will be referred to as the supplemental

list (R. 109). The shipping bills and this list are identified in the Commission's report, and constitute the evidence as to service upon which the Commission's order was based.

We have tabulated below the evidence as to deliveries to consignees in Washington, Oregon, and California, as revealed by the shipping bills and the supplemental list (R. 93, 94, 96, 110, 114, 118). After each date is shown the number of cars delivered on that date (*e. g.*, at Yakima, Washington, the shipping bills show that on April 3, 1935, there were 7 cars delivered).

States	Before June 1, 1935		After June 1, 1935	
	Shipping bills	Supplemental list	Shipping bills	Supplemental list
Washington				
Yakima	Apr. 3, '35: 7	Feb. 28, '35: 10		
Seattle	Apr. 3, '35: 2		Dec. 11, '35: 1	Feb. 14, '36: 6
Vancouver	Apr. 26, '35: 4	May 9, 1935: 4		
Oregon				
Eugene		Apr. 12, '35: 4		
Klamath Falls	Apr. 12, '35: 4			
Portland	Apr. 23, '35: 5 May 13, '35: 11		July 19, '35: 13 Oct. 28, '35: 13	
California				
San Jose	Aug. 14, '34: 1			
Los Angeles	May 22, '35: 2			
San Francisco			Dec. 11, '35: 2	

The table enables the Court to see at a glance the service Fleming was rendering to each of these states and to the entire Pacific coast during the "grandfather" period.

Fleming testified orally respecting his operations to these three states as follows:

Washington.

With respect to Washington, Fleming testified that on June 1, 1935, he was engaged in performing service and making deliveries into Seattle, Vancouver, and Aberdeen. He stated that he had made only two trips to Spokane and that such trips were made subsequent to June, 1935; he did not state when these trips were made and no record of them appears either in the shipping bills or supplemental list. When he first started his operations were chiefly in the south and southeast of the United States and his service into western territory is more or less recent (R. 99).

Oregon.

In Oregon I made deliveries in 1935 at Portland, Klamath Falls, and Salem. With my application for a contract carrier permit to operate in Oregon I filed a copy of my written contract with the Cohen-Anderson Motor Co., and I filed no other contract. On June 1, 1935, I was making deliveries at Salem, Oregon, to the Hudson dealer there. I have not made deliveries to Salem since June 1, 1935. For a time I was making deliveries at Klamath Falls, Oregon, but I am not making deliveries there now. At the present time I have no other consignee in Oregon than the Cohen-Anderson Motor Co. at Portland. We made a few deliveries of automobiles to the Karakeen Motor Co. at Portland subsequent to June 1, 1935. I do not remember the date. I made no report of that to the Public Utilities Commission of Oregon. My arrangement is all through Cohen-Anderson for the delivery of Hudsons and Terraplanes and it was prior to June 1, 1935, although according to directions I made a delivery to Klamath Falls or Salem (R. 99, 101).

California.

I commenced operations this year (1936) with James F. Waters Corporatior of San Francisco, dealer in De Soto cars.

Others we have delivered for in California are Earl

C. Anthony and the Hudson Car Company. Earl C. Anthony was the Hudson Terraplane dealer in Los Angeles. He is now handling another make of car and we are not delivering to him now. We ceased doing business with him in the spring of 1936. We started doing business with him in 1935, I am not sure whether it was prior to June 1 or just after, but it was in the summer of 1935. I know that we made a few deliveries for Earl C. Anthony in the summer of 1935, but I am not certain as to the date; I think we made about three deliveries, a small number of cars. It was more or less temporary, or a substitute arrangement. Anthony caravans most of his own cars and we helped out when he was not in shape to handle some of his own stuff.

In 1934 we had three shipments, and some in 1935, for the Brown Boyd Motor Company of Bakersfield, California, dealers in Hudson and Terraplane. We are not still doing business with them; that was an occasional shipment, it was not a regular continuous business. Since that time that company has conveyed its own vehicles.

Our most recent delivery in California has been for General Motors taxicabs, dealer cabs, last week (prior to July 23, 1936, the date of the hearing). I delivered some GMC trucks in California in February, 1936, but none prior to that time. In June of 1935, I was not engaged in the business of serving General Motors in the shipment of vehicles to California (R. 101-102).

It will be observed that this oral testimony is all general, vague, and inconclusive. It adds nothing to the evidence furnished by the shipping bills and the supplemental list. This is true, among other reasons, because of the circumstances surrounding the supplemental list itself. By agreement this list was to show the consignees served and the dates Fleming began to serve them (R. 104-105). The hearing ended on July 23 (R. 83) and the list was filed with the Commission on August 16. He had ample time to prepare this evidence. In view of all this, the failure of this list to show service is important. It is material to contrast

he meager showing as to the Pacific coast states with the arge number of deliveries shown in the southeastern states (R. 92-95, 109-118).

It is submitted that the foregoing evidence was utterly nsufficient to establish that Fleming was, on June 1, 1935, operating as a common carrier to any point in Washington, Oregon, and California, and "has so operated since that time," within the meaning of Sections 206 (a), 203 (a)(14), and 208 (a). "Since that time" comprises from June 1, 1935, to July 23, 1936, the date of the hearing. *United States* v. *Maher*, *supra* (307 U. S. 148).

Fleming was never employed as a carrier by any person in Detroit, but only by dealers to whom he transported cars (R. 100). To have been a common carrier during the "grandfather" period he must have been carrying for the *general public*, under Section 206 (a). The few deliveries he made to the Pacific coast cities plainly did not constitute serving the general public of those cities. *McDonald* v. *Thompson*, *supra* (305 U. S. 263), and *United States* v. *Maher*, *supra*, establish rules of importance here. In the *McDonald* case the Court said:

> "The expression 'in bona fide operation' suggests absence of evasion, *excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential service* • • •."

In the *Maher* case the applicant was engaged in irregular route operations prior to June 1, 1935, but after that date he discontinued them and instituted a regular route operation. The Court said:

> "Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular 'anywhere-for-hire' service was not 'so operated,' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate, the Commission rightly rejected the application."

What that case principally stands for, as we understand it, is that the period after June 1, 1935, is just as important as that before.

From August 14, 1934, to July 23, 1936, two years, Fleming made trips to nine cities in the three Pacific Coast states. However, only two of the cities served before June 1, 1935, were served after that date. These two were Seattle, Washington, and Portland, Oregon. In California the only city served after June 1, 1935, was San Francisco, but he had not made any trips there before June 1, 1935. As to the cities not served after June 1, 1935, he had not "so operated since that time" (49 U. S. C. A. 306 (a)) so had failed to preserve any possible inchoate rights to such cities that might have originated through service to them on or before June 1, 1935.

Referring now to the only two cities in the three states served both before and after June 1, 1935, the last trip to Seattle was February 14, 1936, five months before the hearing, and the last to Portland was October 28, 1935, nine months before the hearing. It cannot be said that Fleming was in *actual operation* as a common carrier transporting property for the general public to those cities, in the face of those five and nine months' lapses in service.

Seattle has 368,302 population and Portland 305,394. Large numbers of motor vehicles are sold in cities of this size, and there are numerous automobile dealers. If the "general public" is considered the dealers it is obvious that the service rendered by Fleming, whether before or after June 1, 1935, was not an actual, continuing, common carrier service to even one member of that general public. If Fleming's service is sufficient to qualify him for "grandfather" rights, then the number of carriers who can so qualify is almost unlimited.

The "grandfather" clause was meant to allow continuance of operations already serving the public convenience

and necessity. If everyone who has brought a few vehicles into the state is granted a certificate that purpose is defeated and a flood of carriers is loosed far in excess of what is required to meet public convenience and necessity. This results in destroying the fundamental purpose of the Act, regulation in the public interest. Instead of regulation which holds the volume of carriers to the number actually serving public convenience and necessity, there is substituted the rule of indefinite multiplication. Thus the exception, the "grandfather" clause, is permitted to overcome the chief aim of the Act. That these observations are sound is attested by a consideration of authorities including decisions of the Commission itself.

In dealing with these questions it is evident that two considerations are uppermost. The first is the fundamental purpose of the Act. The second is the maintenance of the proper relation between that underlying purpose and the "grandfather" clause. This Court has already pointed the way, saying in *McDonald* v. *Thompson, supra* (305 U. S. 263, 266):

> "As the Act is remedial and to be construed liberally, the proviso defining exceptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. *Piedmont & N. R. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311."

This principle was applied with care in *United States* v. *Maher, supra* (307 U. S. 148).

In cases construing the certificate provisions of Part I of the Interstate Commerce Act, 49 U. S. C. A. 1 (18) to 1 (22), the Court has uniformly ruled that the construction and operation excepted from certificate requirements must be rigidly held within close limits lest a loosening of restrictions result in construction and operation that actually should be determined upon the basis of public convenience and necessity. As the Court said in *Piedmont &*

Northern Railway Co. v. *Interstate Commerce Commissi*
286 U. S. 299, 311:

> "In *Texas & P. R. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277-278, the court announced the guiding principles to be followed in construing the very paragraph involved in the case at bar. As there indicated, the purpose of the statute to develop and maintain an adequate railway system for the people of the United States requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress. Accordingly, a track seven miles in length, proposed to be constructed to reach industries in territory not theretofore served by the railroad, and which would take away from a competitor much of the traffic then enjoyed, was held not to be an 'industrial track,' as that phrase is used in paragraph (22), although by strict construction it was such.
>
> "* * * The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

The "most important" objective of the Motor Carrier Act was described as follows by Chairman Eastman of the Interstate Commerce Commission before the Senate Committee on Interstate Commerce when S. 1629, the Motor Carrier Act, was under consideration. Mr. Eastman was then a member of the Commission and Coordinator of Transportation. He said, referring to S. 1629 and S. 1632, the Water Carrier Act (Hearings before Senate Committee on Interstate Commerce on S. 1629, 74th Congress, 1st Sess., p. 78):

> "I was going on at this moment to mention some of the important objectives which these bills seek to accomplish and which relate to both of the bills.
>
> "The most important thing, I think, is the prevention of an over-supply of transportation; in other words, an over-supply which will sap and weaken the

transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an oversupply which weakens the situation."

A concise statement combining the principles of the above recited views of the Court and Mr. Eastman was made by the Commission in *Carolina Freight Carriers Corporation Common Carrier Application*, 24 M. C. C. 305, 308:[9]

"Furthermore, we have frequently stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the 'grandfather' clauses of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. *To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition.*" (Emphasis supplied.)

In *Loving* v. *United States*, 32 F. Supp. 464 (affirmed by memorandum opinion, 310 U. S. 609), a District Court said:

"*Too, we can imagine possible defeat of the purpose intended to be achieved by enactment of the particular*

9. The Commission's order was annulled by a District Court in a suit brought by the applicant, 38 F. Supp. 549. The Commission appealed to this Court and probable jurisdiction was noted October 13, 1941, *United States* v. *Carolina Freight Carriers Corporation*, Term No. 197.

> *Congressional Act, by granting, under the 'grandfather' clause, of numerous permits where there have been mere offers to perform service without in fact actual performance thereof.*" (Emphasis supplied.)

In *Eastern Carrier Corporation* v. *United States*, 31 F. Supp. 232, the court sustained the order of the Commission in *Eastern Carrier Corporation Common Carrier Application*, 14 M. C. C. 430, granting part and denying part of the authority applied for under the "grandfather" clause. The Commission had said (p. 434):

> "The evidence shows that applicant and its predecessor have transported other commodities and served other points but such operations have been more or less sporadic and not continuous since June 1, 1935."

The District Court said:

> "Considering the tabulation of waybills as evidence, we would conclude, as did the Commission upon all the evidence before it, that the transportation of general merchandise by the plaintiff was sporadic and entirely incidental to its chief business, which was that of transporting silk, rayon, hosiery, and commodities for mills processing or manufacturing such commodities."

In the Commission decisions referred to above there had been proof by applicants of sporadic service, like Fleming's, and the Commission held it insufficient to establish "grandfather" rights. The Commission has attempted to distinguish that line of cases from the present one on the ground that those applicants were transporting "general commodities." In subdivision (D) hereof we will consider the Commission's theory. We think the "general commodities" rule should apply even more strictly in the case of automobile driveaway operations.

The next subdivision of the argument is in many respects a continuation of this one. While some of the argument and

authorities cited in the next division may not apply closely to this one, everything said in this division is altogether applicable to the next one.

(C) THE COMMISSION ERRED IN FINDING THAT FLEMING ESTABLISHED "GRANDFATHER" RIGHTS TO ALL POINTS IN WASHINGTON, OREGON, AND CALIFORNIA, BY HIS OPERATIONS TO THOSE STATES.

Assuming now, for the purpose of argument, that the Commission correctly held that Fleming established "grandfather" rights to Seattle and Portland, the only two cities served both before and after June 1, 1935, nevertheless, the Commission erred in holding that service to these two cities established "grandfather" rights to all points in Washington, Oregon, and California. (While in the next paragraph we refer to San Francisco, we do not include it in this assumption because the first and last service to it was December 11, 1935).

If there had not been the service to Seattle, Portland, and San Francisco, after June 1, 1935, we presume that it would not be held by anyone that Fleming had established "grandfather" rights to the "territory" embraced in those three states. *United States* v. *Maher, supra* (307 U. S. 148). Therefore it appears that the operations to these three cities after June 1, 1935, constituted the basis for the Commission's holding that Fleming was from June 1, 1935, to July 23, 1936, in actual operation as a common carrier transporting property for the general public of Washington, Oregon, and California. These operations consisted of trips to Seattle on December 11, 1935 (one vehicle), and on February 14, 1936 (6 vehicles); to Portland on July 19, and October 28, 1935 (13 vehicles each time); and to San Francisco on December 11, 1935 (2 vehicles).

This requires a consideration of what the "territory" in question and the "general public" within it consists.

Facts of common knowledge show that both are of colossal proportions in comparison with Fleming's service within and to them. With respect to "territory" and "general public" so huge, practically an unlimited number of carriers could have rendered the service Fleming gave, resulting in multiplication without end of the carriers with "grandfather" rights. This utterly defeats the purpose of the Act and of the "grandfather" clause.

There are important cities in the three states not served by Fleming during the "grandfather" period which cannot by any proper construction of the word be said to lie within the "territory" of Seattle, Portland, or San Francisco. In Washington there is Spokane, population 122,001, and 210 miles east of Seattle. Walla Walla, population 18,109, is 200 miles southeast of Seattle and 180 miles southwest of Spokane. Bellingham, population 29,314, is 80 miles north, and Tacoma, population 109,408, is 35 miles south of Seattle. Olympia, the capital, population 13,254, is 50 miles southwest of Seattle. Wenatchee, population 11,620, is 80 miles east of Seattle and 140 west of Spokane.

The population of Los Angeles is 1,504,277. San Francisco has 634,536, and five miles across the bay are Oakland with 302,163, and other adjacent cities. Here are two metropolitan areas 470 miles apart, each with population greatly exceeding a million. Yet the Commission held that they are in the same "territory" and that delivery of two vehicles to one in May, 1935, and two vehicles to the other in December, 1935, gave Fleming "grandfather" rights to the whole state.

Portland is in the northwest corner of Oregon, over one hundred eighty miles from Pendleton, 8847 population, La Grande, 7747, and Baker, 9342, in the northeast part of the state; and the same distance from Medford, 11,281, Ashland, 4744, Grants Pass, 6028, Roseburg, 4924, and Marshfield 5259, in the southwest corner.

Several hundred thousand new passenger and commercial cars were sold by automobile dealers in the three states in 1935 and in 1936, and the smallest number sold in any state in either year exceeded 31,000.[10]

That a large volume of motor vehicles is transported to the coast states by the driveaway method for purpose of sale may be judicially known to the Court.[11]

If every driveaway operator who transported seven vehicles in two trips to any city in Washington, during 14 months after June 1, 1935, with meager service like Fleming's before that date, is to have "grandfather" rights to the entire State of Washington, then there is no limit to the number of carriers who have such rights. Instead of limiting "grandfather" authority to actual service and

10. MOTOR VEHICLE REGISTRATIONS.

	1940	1939	1938	1937	1936	1935
Washington—						
New passenger car registrations	46,497	33,316	23,935	49,699	54,458	36,685
New commercial car registrations	9,306	7,149	5,416	10,222	10,666	9,076
Oregon—						
New passenger car registrations	34,358	25,574	18,769	35,915	40,460	25,749
New commercial car registrations	7,212	5,873	4,064	7,859	8,050	5,964
California—						
New passenger car registrations	250,894	187,720	148,011	246,075	256,255	196,967
New commercial car registrations	32,397	25,656	23,846	36,901	33,656	28,943
Grand Totals	380,664	285,288	224,041	386,671	403,545	303,384

Source: Automotive News, 1941 Almanac Issue, Detroit, July 14, 1941, pp. 54, 110.

11. 15,000 cars per year to California in 1935 and 1936: *Ingels* v. *Morf*, 300 U. S. 290, 296; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 599.

See *Wallace* v. *Pfost*, 57 Idaho 279, 65 P. (2d) 725, 110 A. L. R. 613; *Morf* v. *Bingaman*, 298 U. S. 407; and annotation 110 A. L. R. 622.

Chapter 184, p. 716, Session Laws of Washington, 1937, § 6382-60-73, Remington's Rev. Stat., which regulates and taxes driveaway operations, recites in Section 1:

"The unregulated commercial use of the highways of this state in the caravaning of motor vehicles from other states intended for sale or exchange, most of which vehicles are unlicensed in this state, has contributed to the congestion of such highways, and increased the dangers of driving thereon, and has resulted in deplorable working conditions for employees operating such caravans. This act is remedial and for the purpose of ameliorating such conditions."

actual territory served, any one who has ever set foot in one point in the state has "grandfather" rights to the entire state.

In California about 15,000 vehicles were terminated annually by driveaway in 1935 and 1936.[12] Delivery of five vehicles in two years satisfied the Commission that Fleming was in *actual* operation as a common carrier serving the general public of that state. This produces the fraction 1/6000.

In *Howard Hall Co., Inc.* v. *United States*, 38 F. Supp. 556, the Court sustained the Commission's order in *Howard Hall Co., Inc., Common Carrier Application*, 24 M. C. C. 273, saying:

> "It (the Commission) found that the applicant had not served 'enough representative points in all the states claimed with a sufficient degree of regularity to be entitled to authority to transport general commodities to and from all points within such a large territory as described in the amended application.'"
>
> • • • • •
>
> "The petitioner's second contention is that there was evidence and a finding that there had been 55 movements of freight to and from an area within 100 miles of Birmingham prior to June 1, 1935, and 270 movements in the area thereafter, and that the Commission, therefore, erred as a matter of law in limiting operations 'between Birmingham, Alabama, and all points within 10 miles thereof,' and that the area should have been 'within 100 miles of Birmingham.' As to movements of freight in the 100 mile area the Commission found that of 1,000 shipments transported prior to June 1, 1935, 875 moved to or from Birmingham, and that only 55 moved from points within 100 miles of Birmingham, and that only '12 points were served in the comparatively large territory surrounding applicant's headquarters in Birmingham. Of 2,550 shipments transported after June 1, 1935, only 270 moved to or from 100 miles of Birmingham. The

12. See footnote No. 11.

> evidence of shipments within the 100 mile area claimed by the petitioner did not show substantial, *bona fide* operations of sufficient regularity to require the issuance of a certificate under the 'grandfather clause' authorizing free lance operation in this large territory. In limiting the applicant's operations to and from Birmingham to a ten mile zone beyond the city limits of Birmingham the Commission acted within its authority and not capriciously or arbitrarily."

There is an illustrative parallel between that case and the present one. Fleming conducted to points in certain southeastern states regular and frequent operations which, admittedly, were sufficient to establish "grandfather" rights. Just as in the *Howard Hall* case, *supra*, these operations are to be contrasted with those insufficient to fix "grandfather" rights. The service rendered by Fleming to the southeastern points shows what he actually could do when there was actual public convenience and necessity to be served, that is, when there were actual common carrier operations to be conducted for the general public. Considering together this record and the history of his operations to the western states shows that though he had the *ability* to serve the west there was no sufficient demand for his services to cause him to carry on actual common carrier service to the general public there. Since he did not conduct such a service to the west he was not entitled to "grandfather" rights there.

(D) NO SPECIAL EXCEPTIONS FROM THE GENERAL RULE OF THE "GRANDFATHER" CLAUSE SHOULD BE PERMITTED WITH RESPECT TO DRIVEWAY OPERATIONS.

We understand the Commission to say in its Report (R. 14) that due to the "highly specialized" nature of the transportation service rendered by Fleming there should be some relaxation for him of the general application of the "grandfather" clause. We submit that this view is

not sound. We have heretofore cited a few Commission decisions, which have come before district courts, with respect to "general commodities." We think the principles there exhibited should be applied even more strictly to driveaway operations, instead of being relaxed.

In the preceding subdivision we have pointed to the contrast between Fleming's operations to the west and those to the southeast. This indicates that the meager service to the west was not due to lack of capacity to serve, but rather lack of a demand sufficient to bring about actual common carrier operations for the general public.

It should be particularly noted that there is one feature that distinguishes driveaway service from all other motor carrier operations: it requires no motor vehicle equipment; the equipment requirements are far less than for any other motor carriage; substantially all that is required is to "driveaway."[13] The service that a driveaway carrier may render is therefore not subject to the usual restrictions imposed by limitations of equipment. A hauler of general commodities, or any other motor carrier, must possess expensive motor truck equipment, and his ability to serve is measured by that equipment. The chief factor in the scope of his operations is the extent of his equipment. So when he does serve points he manifests (1) the demand for his services and (2) that he has equipment sufficient to meet these demands. On the other hand, the only restriction on the scope of driveaway operations is the demand therefor.

It follows that an ordinary motor carrier is not likely to be found rendering sporadic service outside of the territorial limitations of traffic density, whereas considerations of equipment and traffic density have much less, if any, effect upon driveaway operations. The incentive to serve a territory, that is, the traffic to be obtained, must be much

13. For Commission safety regulations see Motor Carrier Safety Regulations, Revised. Jan. 1, 1940. Rule 3.5.

greater where it is necessary to operate a truck to carry the freight, than where all that is required is to drive vehicles to the place where they are wanted.

Therefore driveaway operations should be scrutinized more rigorously than any other in determining whether a carrier was in actual operation serving the general public. The only limitation on his ability to serve is the public demand for his services, and if the service has been as meager as that of Fleming in the west it is evident that he was not serving the general public, that there was no demand for his services that could in any remote degree be called a demand by the general public.

A carrier whose actual operations are so sensitive to demand and so foot-loose and free from limitations of equipment should be required to prove public convenience and necessity unless his "grandfather" rights are clearly established.

(E) "TERRITORY" DOES NOT MEAN STATE.

The Commission construed the words "within the territory" to mean that if a carrier is operating to one point in a state the "territory" he is serving is the whole state. Substantially the Commission has construed that the word "territory" means state.

This construction is erroneous. The word "state" is used a number of times in the Interstate Commerce Act to denote the several states of the Union. Thus it appears in Sections 202 (b), 203 (a), 203 (b), 205 (b), 205 (c), 206 (a), and 222 (f). The word "territory" is used in Sections 206 (a), 208 (a), and 209 (a). There is assuredly no warrant for construing "territory" to mean the same as "state". The two words are used to express different meanings, and plainly are not interchangeable.

Congress might have written Section 206 (a) to read

"over the route or routes or *within the states* for which application is made". And Congress' use of the word "territory" instead of "state" raises something more than the ordinary presumptions as to legislative choice; it is affirmatively evident from other provisions of the Act that Congress used the word "territory" to mean something else than "state". Thus Section 205, pars. (b) and (c), authorize the creation of "joint boards" of state officials to consider operations which involve "not more than three states". Section 206 (a) provides certain exemptions from the terms of the Act as to persons carrying on interstate commerce but "engaged in operation solely within any state." In those sections Congress made use of the word "state" to describe operations within certain geographical areas. So when it used the word "territory" in Section 206 (a) it meant something else than "state".

(F) THE PHRASE IN SECTION 206 (A), 49 U. S. C. A. 306 (A), "WITHIN THE TERRITORY FOR WHICH APPLICATION IS MADE", DOES NOT MEAN "ANYWHERE-FOR-HIRE".

The Commission's construction of Section 206 (a) has given that section substantially the same meaning as if the phrase "within the territory for which application is made" had been written "anywhere-for-hire". Such construction is contrary to the plain terms of the Act, and is forbidden by the legislative history of the Act. Early in the history of the movement which led to the enactment of the Motor Carrier Act the Commission and its personnel recommended that Congress classify motor common carriers of property as (a) those operating over a regular route or between fixed termini, and (b) *those operating anywhere for hire.* Congress did adopt classification (a) but did not adopt (b). Instead it adopted something very different, the classification made by Section 208 (a):

"SEC. 208. (a) Any certificate issued under sec-

> tion 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, the intermediate and off-route points, if any, at which, *and in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate;* * * *." (Emphasis supplied.)

There is a vast difference between a carrier authorized to operate "anywhere-for-hire," and one who is authorized to continue to operate in the territory where he actually has been operating. We shall now observe briefly the course of evolution from the idea of "anywhere-for-hire" to "the territory within which the motor carrier is authorized to operate." It offers light on the construction that should be given to "territory", and makes plain some of the Commission's errors in this case.

In 1926 the Commission on its own motion ordered an investigation of motor carrier transportation throughout the country. Attorney-examiner Flynn was assigned to it and conducted extensive hearings. 140 I. C. C. 685; 1926 Annual Report of I. C. C. 41. In 1928 the Commission issued its report based on these hearings in *"Re Motor Bus and Motor Truck operations,"* Docket No. 18300, 140 I. C C. 685. It said:

> (p. 699) "Besides the common-carrier bus operating over a regular route and between fixed termini, there are common carriers holding themselves out to transport passengers by motor vehicle *'anywhere for hire.'"*
>
> (p. 705) "Truck operations fall into one of three general classes: * * * (3) the *common-carrier truck,* which (a) operates on schedule over a regular route or between fixed termini, and usually at published rates from which it may not depart, and (b) *the so-called anywhere-for-hire carrier."*

In 1930-31 Examiner Flynn made a further investigation in I. C. C. Docket No. 23400, "Coordination of Motor

Transportation." 182 I. C. C. 263; 1931 Annual Report of I. C. C. 81. His report was printed as Senate Document No. 43, 72nd Congress, 1st Sess. His conclusions and recommendations, among others, were the following (pp. 115-117):

"17. Regulation of interstate transportation of property by motor vehicles for hire, operating on the public highways in interstate commerce, should be provided for by law. Classification for the purposes of regulation should be made on the basis of: (a) Those operating over regular routes or between fixed termini, (b) *those operating as anywhere for hire common carriers*, and (c) those operating as motor-vehicle contract carriers.

"18. Legislation for the regulation of motor-vehicle lines operating as common carriers of persons or property on the public highways, *except anywhere-for-hire carriers*, should provide as prerequisites to the commencement of such operation: (a) Certificate of convenience and necessity and (b) liability insurance or indemnity bond or satisfactory financial responsibility that will assure adequate protection for the responsibility assumed."

"21. The law should provide that the fact that an applicant for a certificate of public convenience and necessity was in bona fide operation as a common carrier over the route or between the termini described in the application for a reasonable length of time prior to the enactment of regulatory legislation and continuously to the time application is made has so been in operation should be considered prima facie evidence of the public convenience and necessity of such operation. If satisfactory showing is made that such applicant is able adequately to perform the service required, a certificate should be issued to the applicant without further proceedings."

"30. *Anywhere-for-hire common carriers* engaged in transportation of interstate commerce by motor vehicle on the highways should be required to register with the Interstate Commerce Commission, and upon proof of compliance with such requirements as may

be appropriate for the regulation of carriers of that class, be entitled to a permit setting forth such fact. One of the requirements should be the carrying of liability insurance or filing of an indemnity bond to secure the public in cases of personal injury o· property damage. Permits should be issued for a definite period."

The Commission's report in this proceeding contained the following recommendation, among others (182 I. C. C. 386):

"2. Transportation of property for hire by *motor trucks* operating over the public highways in interstate commerce should be subjected by law to reasonable public regulation. Carriers should be divided into two general classes, common carriers and contract (private) carriers. The first should include all carriers who undertake for hire to transport from place to place, over the public highways, by motor vehicle in interstate commerce, the property of those who may choose to employ them. The second should include all carriers not within the discription of common carriers."[80]

80. "The terms 'common carrier,' 'contract carrier,' 'private carrier for hire,' and 'privately owned or operated trucks' refer largely to a practical classification of truck operation. Legally speaking, there are only two classifications of motor-truck operations for hire, namely, common carrier and private carrier."

The foregoing is couched in exceedingly general terms. It may be that the Commission meant that the first class includes only regular route carriers (calling them common carriers as a "practical classification" as stated in the footnote); and that the second class comprised all others, including its own and Examiner Flynn's classification of "anywhere-for-hire" carrier. Or perhaps the Commission meant that the first class includes all common carriers of every type. In either case there is no disapproval of Examiner Flynn's recommended inclusion of the "*anywhere-for-hire*" classification, or of its own previous adoption of this classification in 1928 in 140 I. C. C. 685, 705.

The Interstate Commerce Act, in the respects now under consideration, is precisely contrary to the recommendations of Examiner Flynn, and of the Interstate Commerce Commission in 1928 and 1932 as far as they went. Examiner Flynn recommended (17) that motor common carriers of property be classified as (a) those operating over regular routes or between fixed termini and (b) *"anywhere-for-hire"* carriers: (18) that motor common carriers, *except anywhere-for-hire carriers*, be required to obtain certificates of convenience and necessity: (21, 30) that existing carriers *other than anywhere-for-hire carriers* have "grandfather" rights which would make unnecessary proof of convenience and necessity; and (30) that anywhere-for-hire carriers be permitted to operate without showing convenience and necessity *but for a definite period only.*

In the following four important items the Motor Carrier Act is contrary to Examiner Flynn's recommendations with respect to common carriers not operating over regular routes nor between fixed termini. (1) The Act requires a showing of convenience and necessity by carriers *not* operating over regular routes nor between fixed termini; (2) except that it gives "grandfather" rights to carriers of that class who can qualify. (3) The operating rights granted to that class of carriers are permanent and not for a fixed period. (4) Having done (2) and (3) it was impossible to classify any carriers as "anywhere-for-hire," as that would authorize the granting of innumerable permanent "grandfather" rights to the whole United States.

Therefore, instead of authorizing the "anywhere-for-hire" classification Congress provided in Section 208 (a) that "in case of operations not over specified routes or between fixed termini" the operations of motor common carriers should be delimited by confining them to "the territory within which" they would be permitted to operate. In "grandfather" cases that is the "territory" in which

they have been in bona fide operation during the required period. Section 206 (a).

It is highly important to note that the reasons which impelled Congress to give "grandfather" rights to carriers not operating over regular routes nor between fixed termini also required that such grandfather rights be expressly delimited to the actual territory in which the applicant was in bona fide operation during the grandfather period. That there must be such limitation is obvious; and the history of the change from the idea of anywhere-for-hire carriers with no "grandfather rights" to carriers with definite territory with "grandfather rights" shows, along with other evidence, that the word "territory" as used in the Act should be strictly construed to carry out the purpose evident in this legislative history. That purpose was to avoid the "anywhere-for-hire" classification, and instead to limit "grandfather rights" applicants not operating over regular routes nor between fixed termini to their actual operations, the precise territory they were serving, during the "grandfather" period, that is, on and after June 1, 1935.

The phrase "anywhere-for-hire" does not appear in the Interstate Commerce Act. No equivalent of that phrase appears either, except in a rather limited form applicable to *passenger* carriers only in Section 208 (c):

> "(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to *any place* special or chartered parties under such rules and regulations as the Commission shall have prescribed." (Emphasis supplied.)

The inclusion of passenger carriers in the category of those who may, even in that limited way, transport to "any place," with no corresponding or equivalent clause relating to property carriers, excludes the latter class from any right to the status of anything resembling "anywhere-for-hire" carriers, and denies to the Commission any power to confer that status.

(G) SUMMARY OF EVIDENCE WITH RESPECT TO OTHER STATES: ARKANSAS, TEXAS, TENNESSEE, KENTUCKY, ALABAMA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA.

We have discussed the applicable principles of law in detail with respect to Washington, Oregon, and California. We now summarize the evidence as to the other states, without repeating legal argument.

ARKANSAS.

The District Court annulled the part of the order authorizing service to Arkansas (R. 33, 36). Because this part of the decree is before the Court on cross-appeal we discuss Arkansas here.

At the time of the hearing Fleming's only claim as to Arkansas was that he had served Texarkana, in the southwest corner on the line between Arkansas and Texas. His shipping bills show shipments of five vehicles to Texarkana on March 9, 1935, and five on April 3, 1935 (R. 92). The supplemental list shows five vehicles on March 9, 1935 (evidently the same five above referred to), and fifteen on May 12, 1935 (R. 110). His only testimony on this point is: "In Arkansas we have one place in Texarkana, but we do not serve any other dealers in the state and were not in 1935" (R. 103).

Texarkana has a population of 11,821. In the center of the state is Little Rock (north and south) with a population of 109,176. Northwest of Little Rock is Fort Smith with 36,584. A short distance from Little Rock are Hot Springs and Pine Bluff, each with over 20,000. In the northeastern part of the state are Blytheville and Jonesboro, each with over 10,000 population.

Here again the error of the Commission in its construction of the Act is evident in that it considered all of

Arkansas, including all of the above named cities, to be in the "territory" of Texarkana.

But a more fundamental error is the Commission's finding that Fleming, on June 1, 1935, and since that time, was operating as a common carrier to any point in Arkansas. His last shipment to Arkansas was on May 12, 1935, more than fourteen months before the date of the hearing. Any common carrier who makes no deliveries to a state from May 12, 1935, to July 23, 1936, the date of his "grandfather" clause hearing, could not have been in bona fide operation on June 1, 1935, and have "so operated since that time."

TEXAS.

The shipping bills show shipments to the following Texas points (R. 95):

On or before June 1, 1935.

January 3, 1935	Tyler	1 Terraplane 3 Hudsons

After June 1, 1935.

December 21, 1935	Laredo	2 Hudsons 4 Terraplanes
January 3, 1936	Marshall	2 Hudsons 3 Terraplanes
January 3, 1936	Paris	4 Terraplanes

The supplemental list shows (R. 117-118):

Before June 1, 1935.

April 22, 1935	Ennis	2 Vehicles
May 17, 1933	Ft. Worth	2 Vehicles
July 20, 1933	Ft. Worth	12 Vehicles
December 18, 1933	Ft. Worth	2 Vehicles
May 8, 1935	Ft. Worth	6 Vehicles
October 4, 1933	Itasca	2 Vehicles
November 16, 1933	Itasca	2 Vehicles
February 16, 1935	San Antonio	2 Vehicles

After June 1, 1935.

April 1, 1936	Colorado	2 Vehicles
July 31, 1935	Laredo	2 Vehicles
January 14, 1936	Laredo	4 Vehicles
January 28, 1936	Laredo	7 Vehicles
March 2, 1936	Laredo	2 Vehicles
May 15, 1936	Laredo	5 Vehicles
July 15, 1936	Laredo	4 Vehicles
December 14, 1935	Marshall	4 Vehicles
February 1, 1936	Marshall	5 Vehicles
July 10, 1936	Marshall	6 Vehicles
July 15, 1936	Marshall	2 Vehicles
January 3, 1936	Paris	4 Vehicles
July 16, 1936	Paris	4 Vehicles
May 1, 1936	Sherman	4 Vehicles
November 13, 1935	Tyler	4 Vehicles
November 23, 1935	Tyler	4 Vehicles
December 5, 1935	Tyler	6 Vehicles
December 21, 1935	Tyler	4 Vehicles
January 3, 1936	Tyler	4 Vehicles
April 10, 1936	Tyler	4 Vehicles

Fleming's testimony relative to Texas is the following:

I served used car dealers in Fort Worth, Texas, in 1934; that was my first movement into Texas. I am not now handling used cars. I am not now engaged in handling that business for those persons at Fort Worth. I serve the Automobile General Corporation of Dallas, dealers in Hudson Terraplanes, and the Hudson Terraplane dealer at Paris and Marshall in Texas. I had been serving the dealer at Dallas something like over a year, prior to June 1, 1935. I have a record of that. I began to serve the dealer at Paris and the dealer at Marshall subsequent to June 1, 1935. We have made deliveries on a few occasions to the Orsinger Motor Company at San Antonio, a Hudson Terraplane dealer. We are not now doing business with him. I believe we made two or three deliveries to him. I would say that his business was an open account on June 1, 1935. The last shipment I handled for him was sometime prior to June 1, 1935. We have not served any other dealers in San Antonio. I say the

> Orsinger Motor Company was an open account because we were holding ourselves ready to serve him because we had served him in the past, and we were ready to serve him. He was considered one of our standing accounts. I did not give consideration as to any definite time. Any time I do business with any one individual I am willing to do business with him again. I do have a very few written contracts with my customers, other than at Portland. I do not have a written contract with the Orsinger Motor Company. I handled two or three small shipments for them. I believe those are about the only points in Texas that we served. We go there continuously, though, and have for some time (R. 102-103).

A careful examination of Fleming's presentation of his testimony as to Texas, a state of immense distances and large cities, will demonstrate that he did not establish "grandfather" rights to any points in that state. If he really had been serving that vast territory prior to June 1, 1935, and continuously since that time, he assuredly would have made a better showing in the representative shipping bills attached to his application. These show only one shipment to Texas prior to June 1, 1935, 4 vehicles, on January 3, 1935, to Tyler, a city of 28,279 population in the northeastern part of the state, but no shipments after that to Tyler.

With reference to Ft. Worth, Fleming's testimony shows that the shipments to that point were used cars to used car dealers, and that he is not now hauling used cars nor serving those dealers. That is all of the testimony regarding Ft. Worth and that plainly relates to the shipments shown on the supplemental list.

With respect to San Antonio, the supplemental list shows the shipment of two vehicles on February 16, 1935. Fleming stated in his oral testimony that he had made a few deliveries to one dealer there prior to June 1, 1.35, but none subsequent to that date.

With respect to Dallas, population 294,734, Fleming furnished no shipping bill proof whatsoever as to operation to that important city. Dallas is not shown on the supplemental list. His testimony was apparently intended to convey the thought that he is now serving Dallas and that he had been serving the Hudson-Terraplane dealer there for more than a year prior to June 1, 1935. It is submitted that his character of proof is not sufficient to establish "grandfather" rights to Dallas, and thereby avoid a showing of public convenience and necessity for service to that place. *It is further submitted that it is singular, indeed, that Fleming could and did furnish rather detailed information as to operations which he had discontinued long before the hearing, but could not and did not furnish any shipping bill or other evidence as to operation to the only city in Texas, Dallas, which he claimed to be actually serving at the time of the hearing.*

However, if we assume for purpose of argument that Fleming established that he was on June 1, 1935, serving all of the cities named, and had continued to serve them since that time, it most certainly follows that even that showing does not establish that the "territory" he was serving by virtue of service to such cities was the entire state of Texas. Houston (pop. 384,514), Galveston (pop. 60,862), Amarillo (pop. 51,686), El Paso (pop. 96,810), Port Arthur (46,140), Beaumont (59,061), are all more than 193 miles from any city in Texas mentioned in Fleming's evidence, and the farthest is 500 miles away.

TENNESSEE.

We do not complain of the order of the Commission insofar as it found that Fleming had "grandfather" rights to Knoxville and Chattanooga in Tennessee. The shipping bills attached to Fleming's application to the Commission (R. 95) show a series of shipments to these two cities

before June 1, 1935 and one shipment to each in December, 1935. No other Tennessee point is mentioned in these shipping bills.

The supplemental statement (R. 116-117) also shows a rather continuous series of shipments to these same two cities, Chattanooga and Knoxville, both before and after June 1, 1935.

Now it is highly significant that the only two cities in Tennessee which are found either in the shipping bills at all, or in the supplemental list prior to June 1, 1935, are Chattanooga and Knoxville. The only other shipments to Tennessee shown in any way in the evidence are the following, all subsequent to June 1, 1935, shown in the supplemental list:

June 16, 1936	Elizabethton	2 Vehicles
July 9, 1935	Kingsport	2 Vehicles
July 16, 1935	Kingsport	2 Vehicles
December 14, 1935	Kingsport	2 Vehicles
October 8, 1935	Nashville	4 Vehicles

Knoxville (pop. 111,580) and Chattanooga (pop. 128,163) are both in the eastern part of Tennessee. Kingsport (14,404) and Elizabethton (8,516) are both in the extreme northeast corner of Tennessee.

Most assuredly the "territory" of Knoxville and Chattanooga does not include Nashville (pop. 167,402) in the central part of the state or Memphis (pop. 292,942) in the southwestern corner of the state. The only shipment to Nashville shown in all of the evidence was four vehicles on October 8, 1935. No shipments were shown to Memphis. It is plain that the Commission was in error in authorizing service based on "grandfather" rights to Nashville and Memphis; that is, to any other part of Tennessee than that included in the strip on the eastern edge of the state wherein lie Knoxville and Chattanooga.

Fleming's only oral testimony with respect to Tennessee was the following:

We have moved in Tennessee continuously; that was at the inception of my business (R. 105).

Certainly that broad statement cannot be a substitute for detailed evidence. Particularly is this true in view of the good showing made as to Chattanooga and Knoxville. Even in his supplemental statement Fleming could not show any shipment to Memphis and could only show one to Nashville, more than four months after June 1, 1935. It is 115 miles from Chattanooga to Nashville; 165 miles from Knoxville to Nashville and 265 miles from Chattanooga to Memphis.

KENTUCKY

The shipping bills show the following shipments to Kentucky points (R. 93):

On or before June 1, 1935.

April 17, 1935	Corbin	2 Dodges
June 15, 1934	Louisville	1 Dodge Truck
May 29, 1934	Williamsburg	2 Hudsons
July 27, 1934	Williamsburg	2 Hupmobiles
May 7, 1935	Williamsburg	4 Dodges
May 16, 1935	Corbin	1 Dodge
	Williamsburg	1 Plymouth

None after June 1, 1935.

The supplemental list shows the following shipments prior to June 1, 1935 (R. 112-113):

April 17, 1935	Corbin	2 Vehicles
June 15, 1934	Louisville	1 Vehicle
September 1, 1933	Williamsburg	2 Vehicles
October 23, 1933	Williamsburg	2 Vehicles
December 9, 1933	Williamsburg	2 Vehicles
December 27, 1933	Williamsburg	2 Vehicles
August 28, 1934	Williamsburg	3 Vehicles
October 11, 1934	Williamsburg	1 Vehicle

December 29, 1934	Williamsburg	2 Vehicles
March 2, 1935	Williamsburg	1 Vehicle
May 7, 1935	Williamsburg	4 Vehicles
May 29, 1935	Williamsburg	1 Vehicle

After June 1, 1935.

June 7, 1935	Corbin	1 Vehicle
February 12, 1936	Louisville	1 Vehicle
July 3, 1935	Williamsburg	1 Vehicle
August 14, 1935	Williamsburg	2 Vehicles
October 8, 1935	Williamsburg	1 Vehicle
November 16, 1935	Williamsburg	1 Vehicle
December 6, 1935	Williamsburg	1 Vehicle
December 18, 1935	Williamsburg	3 Vehicles
January 17, 1936	Williamsburg	2 Vehicles
February 8, 1936	Williamsburg	1 Vehicle
March 4, 1936	Williamsburg	1 Vehicle
April 7, 1936	Williamsburg	2 Vehicles
April 17, 1936	Williamsburg	1 Vehicle
May 2, 1936	Williamsburg	1 Vehicle
June 20, 1936	Williamsburg	1 Vehicle
July 10, 1936	Williamsburg	3 Vehicles
July 18, 1936	Williamsburg	2 Vehicles

We do not dispute the Commission's action in authorizing service to Williamsburg (pop. 2,331), in the southeastern corner of the state. The shipping bills and the supplemental statement show a fairly continuous series of shipments. Here again, however, this excellent showing as to one small town in the state 138 miles from Louisville contrasts significantly with his showing as to that city or any other important city in the state. If he had been able to make such a showing as to Louisville or any other city he assuredly would have done so. He testified as to Kentucky:

> In Kentucky we serve accounts in Louisville and Williamsburg; we served them on June 1, 1935, and still serve them (R. 105).

Leaving Louisville for a moment, the only other city mentioned in Fleming's evidence is Corbin (pop. 7,893) also in the southeastern corner of the state about 15 miles north of Williamsburg. As to Corbin the showing is even better than Louisville, there having been shipments shown to Corbin of 2 vehicles on April 17, 1935, one on May 16, 1935, and one on June 7, 1935. Fleming's statement in his oral testimony shows that "since that time" he has not served Corbin.

Coming now to Louisville the best showing as to actual shipments which Fleming could make, either in the shipping bills attached to his application or in the supplemental statement was one Dodge truck to Louisville on June 15, 1934 (shown in both of the foregoing), and one vehicle on February 2, 1936 shown in the last filed supplemental statement.

It is submitted that this showing entitled Fleming to no other "grandfather" rights in Kentucky except to Williamsburg and that town's actual trade territory. That is the only territory Fleming was serving in Kentucky as a common carrier on and since June 1, 1935. In no event could the foregoing evidence be said to show that the territory Fleming was serving was the entire State of Kentucky.

ALABAMA.

We do not dispute the order of the Commission insofar as it authorizes service to Birmingham, Alabama. Both the shipping bills and the supplemental list show a fairly continuous series of shipments to that city both before and after June 1, 1935 (R. 92, 109-110). As we have pointed out with respect to other states, however, the excellent showing as to Birmingham and the complete lack of a similar showing to any other city should most assuredly be taken into consideration by the Court.

Fleming testified orally as follows:

> In Alabama I serve a Hudson Terraplane dealer named Cullman in Gadsden. I have been doing business with him since some time prior to June, 1935. This is my fourth year doing business for the distributor at Birmingham, a Hudson Terraplane dealer, and with the Hudson Terraplane distributor at Montgomery. The Hobby Motor Company. I have had a contract to deliver Packard cars at Montgomery for the past two years. Then there is the Apt Motor Company at Birmingham. I believe I do not serve any other consignees in Alabama but I am not positive (R. 104).

However, the foregoing testimony is fully explained by Fleming's supplemental list (R. 109-110). From that list it will be seen that service to all of the points named, except Birmingham, started after June 1, 1935. We must take this to be so because no shipments are shown to these points on Fleming's shipping bills or supplemental list except those after June 1, 1935; and if there had been shipments before that date he assuredly would have shown them on one list or the other, considering the fact that as to some points he shows on both lists a considerable number of shipments prior to June 1, 1935.

It is thus established by undisputed evidence that Birmingham was the only city in Alabama which Fleming was serving on or prior to June 1, 1935. This showing was plainly insufficient as a matter of law to warrant the finding of the Commission that on June 1, 1935 he was serving other "territory" comprising the entire State of Alabama, including the cities of Mobile (pop. 78,720), Montgomery (pop. 78,084), Selma (pop. 19,834), Decatur (pop. 16,604), or the many other sizeable cities of the state. It is 210 miles from Birmingham to Mobile, and 85 miles from Birmingham to Montgomery.

GEORGIA.

Fleming testified as follows with reference to Georgia:

> In the State of Georgia we have many accounts. I cannot enumerate them all; the largest is J. W. Goldsmith at Atlanta, a Hudson-Terraplane dealer. We deliver Dodge trucks at Savannah (R. 104).

The shipping bills and the supplemental list show a more or less continuous course of shipments both before and after June 1, 1935, to Atlanta, Augusta, Columbus, Savannah, Albany and Macon (R. 93, 110-112) and we do not contest the order of the Commission insofar as it authorized service to those points.

The Commission found that Fleming had shown service to seven points in Georgia during the "grandfather" period. Apparently the seventh point must have been Rome. Only two shipments to Rome are shown prior to "grandfather" date, on January 16 and February 15, 1935, and one appears in August, 1935. We submit that these first two shipments were not sufficient to establish that Fleming was in operation to Rome on June 1, 1935; but in any event the one shipment in August, 1935, does not suffice to show continuous service "since that time".

It is submitted that defendant Fleming failed to show that the "territory" he was operating in on June 1, 1935, and has continued to serve since that time, is the entire State of Georgia.

NORTH CAROLINA.

Fleming's only oral testimony as to North Carolina is the following: In North Carolina we deliver Grahams at Winston-Salem and Hudson Terraplanes in that state (R. 104).

The shipping bills and the supplemental statement show a fairly regular, though not numerous, course of ship-

ments to Asheville and Charlotte, both before and after June 1, 1935; and we do not contest the Commission's order insofar as it authorizes service to those two points (R. 94, 113-114).

The shipping bills and the supplemental list show service prior to June 1, 1935, to only one other point in the state, Raleigh, as follows:

On or before June 1, 1935.

November 21, 1934	Raleigh	6 Terraplanes
		1 Hudson
February 21, 1935	"	9 cars
April 22, 1935	"	5 vehicles
May 9, 1935	"	4 Hudsons
May 29, 1935	"	12 vehicles

After June 1, 1935.

August 7, 1935	Raleigh	4 vehicles
August 22, 1935	"	4 vehicles
October 16, 1935	"	4 vehicles
November 27, 1935	"	3 Hudsons
		1 Terraplane

It will be noted that the last shipment to Raleigh was on November 27, 1935. With no shipments to that point since that date it cannot be said that Fleming had continued to serve that point from June 1, 1935, to the date of the hearing, July 23, 1936.

Asheville and Charlotte are both in the western half of the state, and proof of operation to them sufficient to qualify Fleming for "grandfather" clause authority certainly does not establish that he was serving the "territory" in which is found Wilmington on the coast (pop. 33,407); Winston-Salem in the north central part (pop. 79,815); Durham (pop. 60,195) or Greensboro (pop. 59,319).

SOUTH CAROLINA.

With reference to his operations in South Carolina defendant Fleming testified:

> We serve practically every city in South Carolina. Besides Hudsons and Terraplanes we delivered some Dodge trucks and Dodge and Plymouth cars. We delivered Grahams at Wilmington and Charleston (R. 104).

We do not contest the order of the Commission insofar as it authorized service to Columbia and Hartsville. Both the shipping bills and the supplemental list (R. 95, 114-116) show consistent service to those points both before and after June 1, 1935. That showing is again to be contrasted with the weak showing or the absence of showing as to other cities which the Commission held Fleming was serving on the "grandfather" date.

Shipments to other points in South Carolina than Columbia and Hartsville, as shown by the shipping bills and supplemental list, are the following:

On or before June 1, 1935.

April 3, 1935	Anderson	2	Vehicles
July 14, 1933	Charleston	4	"
November 30, 1933	"	2	"
April 4, 1934	Greenwood	2	"
April 4, 1935	"	2	"
September 13, 1934	Lake City	2	"

After June 1, 1935.

November 8, 1935	Anderson	4	Vehicles
January 31, 1936	Greenville	4	"
June 25, 1936	Spartanburg	2	"
July 11, 1936	"	2	"

It will be observed that the only points in the above list to which service was performed prior to June 1, 1935, are Charleston, Lake City and Greenwood, where cars were

delivered in 1933, 1934, and April, 1935, and none since; and Anderson where deliveries were made on April 3, 1935 and November 8, 1935. As to these cities, therefore, if any inchoate "grandfather" rights accrued prior to June 1, 1935, they were lost by failure to operate to those points "since that time".

Charleston (pop. 71,275) is 110 miles from Columbia (pop. 62,396) and Hartsville (pop. 5,399). It is assuredly not in the "territory" of those two cities. They are nearer to Charleston than any other points shown in the evidence to have been served, except Lake City (pop. 2,522), 80 miles north of Charleston. The deliveries to Charleston consisting of four vehicles in July, 1933 and two in November, 1933, do not warrant the granting of any "grandfather" rights to Charleston.

3.

APPELLEE FLEMING WAS OPERATING IN CERTAIN TERRITORY IN INTENTIONAL VIOLATION OF LAW BEFORE AND AFTER JUNE 1, 1935, AND THE COMMISSION THEREFORE ERRED IN HOLDING THAT HE WAS IN BONA FIDE OPERATION IN THAT TERRITORY.

(A) FLEMING HELD A CONTRACT CARRIER PERMIT ISSUED BY THE STATE OF OREGON AND WAS A CONTRACT CARRIER THERE AND NOT A COMMON CARRIER DURING THE "GRANDFATHER" PERIOD.

In Oregon appellee Fleming was not in bona fide operation as a common carrier, because he was, during the "grandfather" period, in operation there by his own choice as a *contract carrier*. It was and is impossible, under both the Oregon statutes and the Motor Carrier Act for him to have been a common carrier there when he was a contract carrier there.

On this point he testified:

"I am familiar with the requirements of the law of

Oregon for my operations. I secured a contract carrier permit from the Public Utilities Commission of the State of Oregon about January 10, 1936. I secured an Oregon dealers license in 1935 for my automobiles. I did not secure any other permit or certificate for operation in the State of Oregon at any time prior to January 10, 1936." (R. 99-100.)

"Q. You were a contract carrier, held a contract carrier permit in Oregon, but you were not a common carrier, is that correct?

"A. Correct." (R. 101.)

He testified that with his application for a contract carrier permit to operate in Oregon he filed a copy of his written contract with Cohen-Anderson Motor Company, and filed no other contract. At the time of the hearing (July 23, 1936) he had no other consignee in Oregon except that company. His present arrangement in Oregon is all for delivery of Hudsons and Terraplanes and it was the same prior to June 1, 1935. At the direction of this company, however, he had made a delivery on or prior to June 1, 1935, to Klamath Falls or Salem (R. 101).

It is therefore evident that since January 10, 1936, at the latest, until the time of the hearing, defendant Fleming was an interstate contract carrier in Oregon and not a common carrier. It seems apparent that he was also a contract carrier in Oregon prior to January 10, 1936. But whatever his status prior to January 10, 1936, his legal status since then by his own choice has been that of a contract carrier by virtue of obtaining a permit as a contract carrier. His status as a contract carrier since January 10, 1936, is sufficient to defeat any claim under the "grandfather" clause to common carrier rights in Oregon. He admitted to contract carrier status at the hearing and never made any claim that he was a common carrier in Oregon.

A sequence of dates is of interest. On January 10, 1936, he applied for and obtained from the State of Oregon a contract carrier permit, and never had any other author-

ity from the State of Oregon to operate as a motor carrier. On February 5, 1936, he executed under oath his application for "grandfather" rights authority as a common carrier (R. 57).

If he was in good faith when he applied to the Oregon Commission for a contract carrier permit, which he secured about January 10, 1936, and if he in good faith operated as a contract carrier under such permit since that time, obviously he was not operating since that time in good faith as a common carrier. On the other hand, if at the time he applied to Oregon for a contract carrier permit, and at the time he received the same on January 10, 1936, he was not in fact a contract carrier but a common carrier, and if he continued to operate as a common carrier under that contract carrier permit, then plainly enough he was not operating in good faith in any respect. In either of these situations, and one or the other must necessarily have been true, he was not operating "since that time" in good faith as a common carrier.

The case is ruled at this point by both *McDonald* v. *Thompson*, 305 U. S. 263, and *United States* v. *Maher*, 307 U. S. 148, both discussed in division 2. In the *McDonald* case the "grandfather" application was denied because the carrier was operating in violation of law, hence not in bona fide operation.

In *United States* v. *Maher*, Maher's "grandfather" application was denied because the operation he was conducting at the time of his hearing was a different one from that he had been carrying on on June 1, 1935. Applying that case to this one, Fleming's sworn application states that he was on June 1, 1935, operating in Oregon as a common carrier. If that is true, he nevertheless abandoned that operation on January 10, 1936, to become a contract carrier, and he has remained a contract carrier ever since. As the Court said in the *Maher* case (307 U. S. p. 155):

"Since the new regular route of appellee was not in

existence on June 1, 1935, and the irregular 'anywhere-for hire' service was not 'so operated,' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate, the Commission rightly rejected the application."

The Interstate Commerce Act distinguishes between and classifies separately common and contract carriers. See Sections 203(a) (14) and (15), 204(a), 206, 209, and elsewhere. So do the laws of Oregon. See (in Appendix A hereto) Sections 55-1342 (f) and (g), 55-1347, and 55-1349, 1935 Supplement to Code of Oregon.

(B) WHILE OPERATING MOTOR VEHICLES THROUGH NEBRASKA APPELLEE FLEMING CLAIMED THAT THE VEHICLES WERE HIS OWN IN ORDER TO ESCAPE PAYMENT OF LICENSE FEES.

Appellee Fleming showed by his own testimony that his operations through Nebraska were being conducted in violation of law to escape payment of license fees due Nebraska. His testimony on this is the following (R. 100):

When I take possession of cars for delivery from the point of manufacture to destination the title to the cars is in the dealer. The dealer is the one who employs me. I solicit the dealer for the business.

Q. In no event are you still performing these services and transporting these cars where you are the owner of the vehicles?

A. Yes, I am. In my operation at this particular time I am the owner of vehicles when they pass through the State of Nebraska.

Q. You are the owner of the vehicles when they pass through the State of Nebraska, because by a ruling of the Nebraska Department they require vehicles to be registered in the name of the owner and the plates can then be transferred from one vehicle to another by the mere payment of a $1.50 fee, is that right?

A. That is right.

Q. Then in order to save the necessity of buying new plates for any dealer and standing the expense of new plates, you contend that you are the owner of those vehicles when you pass through Nebraska?

A. In title, yes.

Q. In title? And where did you pay for it?

A. I didn't pay.

Q. As a matter of fact, you did not pay for them. You took a bill of sale to them?

A. No, I did not take a bill of sale.

Q. As a matter of fact, when you got to Nebraska you merely contended that you were the owner so that you might use these plates of John P. Fleming Drive-away?

A. That is entirely it, but in Nebraska they file applications, and this law only takes that, if this is the proper way, only in so far as we meet their requirements.

Q. Well, aside from that so-called arrangement in Nebraska, you are not the owner in any of the other states?

A. No.

This shows wilful violation of law to avoid payment of state taxes, and therefore lack of bona fides. However, if it be urged that he was not violating the law, but that by some legerdemain he was owner of the vehicles, then in that case he was not moving them as a common carrier. In either case he was not "in bona fide operation as a common carrier by motor vehicle * * * within the territory for which application is made * * *." (Sec. 206 (a).)

In a case having some similarity the Commission denied an application for "grandfather" rights on the ground that the applicant was not in *bona fide* operation, saying, *M. L. Peterson Common Carrier Application*, 14 M. C. C. 443, 446:

"Applicant admits that the system of buying and selling the goods transported was entered into and continued solely for the purpose of creating a transporta-

tion business. It is apparent that the scheme of operation was one designed to cover up the true nature of the business by making it appear to be one of private carriage, when in fact it was not, so that he would be able to operate unmolested as a motor carrier for hire without the necessity of complying with existing state laws requiring that certificates or permits be obtained authorizing such operations for hire over the public highways."

Conclusion.

We think it apposite here to quote from *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, *supra* (286 U. S. 299, 312):

> "In cases where an appreciation of the facts is requisite to proper classification it is not always easy to draw the line. Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception of paragraph (22). But this is not such a case. The facts clearly require a holding that petitioner's railway is not within the true intent and purpose of the exclusion intended by the paragraph."

We believe that the undisputed facts and the plain law are so overwhelmingly against the Commission's order that this is a case where it is "easy to draw the line." No doubt there are borderline cases where the scales may be tipped by the principle of administrative discretion but this is clearly not one of them.

Respectfully submitted,

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APPENDIX A.

(Parts of 1935 Supplement to Code of Oregon.)

SEC. 55-1342. Definitions.

(f) "Common carrier" means any person who transports for hire or who holds himself out to the public as willing to transport for hire, compensation or consideration by motor vehicle, from place to place, persons or property, or both, for those who may choose to employ him.

(g) "Contract carrier" means any person engaged in transportation by motor vehicle of persons or of property, or of both, for compensation, under special and individual agreements, leases, or other arrangements, and not included in the term common carrier as hereinbefore defined.

SEC. 55-1347. Contract Carriers Regulated.

The commissioner hereby is vested with power and authority, and it shall be his duty, to supervise and regulate all contract carriers of persons or of property, or of both, as defined in section 2 (par. 55-1342) of this act, and, with respect thereto, exercise and perform all and singular the powers and duties stated as sub-paragraphs (a), (b), (c), (f) and (g) in subdivision 1 of section 6 of this act (par 55-1346), except that he shall not require contract carriers to be or become common carriers. Every contract carrier hereby is forbidden to give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with patrons of any common carrier or to subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage or by unfair competition to destroy or impair the service

or business of any common carrier or the integrity of the state's regulation of any such service or business; and, to the end that the commissioner may inforce these provisions, each such contract carrier shall file with the commissioner copies of his contract, immediately upon the making of said contract, including the rates, fares, charges and practices called for or contemplated in the performance of the contract, for review and revision and subsequent approval or modification as to rates, fares, charges and practices by the commissioner, and the commissioner shall be empowered upon receiving same to suspend said rates, fares, charges and practices as to further service under said contract pending investigation thereof by the commissioner, and he, the said commissioner, shall have jurisdiction over said rates, fares, charges and practices to the same extent as is required by sub-division 2 of section 6 (par. 55-1346), Chapter 429, Oregon Laws, 1933, in the case of common carriers, and the provisions of subdivision 2 of section 6 (par. 55-1346), chapter 429, Oregon Laws 1933, are by this reference made applicable to contract carriers and the commissioner shall apply and enforce the same accordingly; provided, that the commission shall have no authority to fix rates on agricultural, horticultural, poultry, dairy, livestock, timber or livestock products in the transportation from the point of origin to or from the packing or processing plants, or to the nearest market or shipping point, when not transported in competition with common carriers and/or railroads. The deposit of a copy of said contract in the postoffice, addressed to the commissioner at Salem, Oregon, with the postage paid thereon, shall for the purpose of this act be deemed a filing and thereupon the carrier may proceed under his said contract unless the same is suspended by the commissioner. The filing of such contract shall be without additional cost to the contract carrier (L. 1933, ch. 429, #7, p. 750; L 1933 (2d Sp. S.), ch. 94, #3, p. 237.)

SEC. 55-1349. Permits—Licenses.

SEC. 55-1349. 1. It shall be unlawful for any person to operate any motor vehicle on any highway in this state as a common carrier, either as a fixed termini or anywhere-for-hire carrier, a contract carrier, private carrier, special carrier in the transportation of persons or property or both without first applying for and obtaining, in addition to the license required by law, a permit from the commissioner covering the proposed operation.

The commissioner shall, in issuing permits, classify the applicants as to their proper class under the law and no carrier shall operate in a different class without permit from the commissioner.

3. Common carriers and contract carriers engaged or to engage exclusively in interstate operations shall make application to the commissioner for permit and pay the application fee as provided for in this act, but the commissioner shall issue permit to them without the necessity for a hearing and as a matter of course, conditioned that they furnish insurance policy as required by this act. Said person so engaged exclusively in the conduct of interstate transportation shall:

(a) Currently pay to the commissioner the road tax mileage fees prescribed by section seventeen (17) and section nineteen (19) of this act;

(b) Observe and comply with the provisions of the laws of this state regulating traffic on its highways, or the operation of motor vehicles thereon, or limiting the size, weight or speed of motor vehicles;

(c) Observe and comply with the laws of this state and with the orders, rules and regulations of the commissioner and of the highway commission to protect the highways from substantial damage and to promote safety to other users thereof and to adjacent property and facilities and to the public.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY, et al.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and JOHN P. FLEMING,
An Individual, Doing Business as John P. Fleming Driveaway Service,
Appellees

On Appeal from Decree of a Specially Constituted District Court of the United States for the Eastern District of Michigan, Southern Division

---

BRIEF OF APPELLEE JOHN P. FLEMING

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Dated: Detroit, Michigan,
December 10, 1941.

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OPINIONS BELOW

The Opinion of the specially constituted District Court appears in 36 F. Supp. 898 (R. 29). The Report of the Interstate Commerce Commission, Division 5, appears in 8 MCC 469 (R. 8).

JURISDICTIONAL STATEMENT

This case comes to the Supreme Court by direct appeal, 28 U. S. C. A. 345 (4), from a decree of a specially constituted United States District Court of Three Judges 28 U. S. C. A. 47.

STATEMENT OF CASE

Appellants' statement of the case is accepted without correction, pursuant to Rule 27, Revised Rules of the Supreme Court.

ARGUMENT

I.

THE INTERSTATE COMMERCE COMMISSION ORDER WAS WITHIN THE SCOPE OF THE POWERS VESTED IN THE COMMISSION BY CONGRESS AND CONSTITUTED A SOUND EXERCISE OF THE COMMISSION'S ADMINISTRATIVE DISCRETION

A. The Commission Had Power to Issue the Order.

The Motor Carrier Act, 1935, now Part II of the Interstate Commerce Act (U. S. Code Title 49 Sec. 301), approved August 9, 1935, effective October 15, 1935, regulated motor carrier transportation in interstate commerce and prohibited such transportation by motor common carriers until they had received from the Interstate Commerce Commission a certificate of public convenience and necessity. Under the "grandfather" provisions of the Act (U. S. Code Title 49, Sec. 306(a)) a motor common carrier engaged in "*bona fide*" operations on June 1, 1935, could obtain a certificate of public convenience and necessity upon proof of such "*bona fide*" operations and upon filing of an application in conformity with the regulations of the Commission.

As might be expected, Congress delegated the administration of the Act to the Interstate Commerce Commission, an administrative body created by Congress for the express purpose of regulating interstate commerce.

"The regulation of such transportation and of the procurement thereof, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission."

Interstate Commerce Act, Part II, Sec. 202(a)
U. S. Code, Title 49, Sec. 302(a).

"It shall be the duty of the Commission to regulate common carriers by motor vehicle as provided in this part * * *."

Interstate Commerce Act, Part II, Sec. 204(a) (1)
U. S. Code, Title 49, Sec. 304(a) (1).

"It shall be the duty of the Commission to administer, execute and enforce all provisions of this part to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration;"

Interstate Commerce Act, Part II, Sec. 204(a) (6)
U. S. Code, Title 49, Sec. 304(a) (6).

Express authority was given to the Interstate Commerce Commission to issue certificates of public convenience and necessity under the "grandfather clause" of the Act. Where a motor common carrier applies for a certificate of public convenience and necessity under the "grandfather clause" of the Act, upon due proof of *"bona fide"* operation on the statutory grandfather date.

"The Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings."

Interstate Commerce Act, Part II, Sec. 206(a)
U. S. Code, Title 49, Sec. 306(a).

B. Determination of the Scope of the Order Was Delegated to the Commission.

In deciding an application filed by a motor common carrier for a certificate of public convenience and necessity under the "grandfather clause" of the Act, it was necessary for the Commission to determine that common motor carrier transportation operations were being conducted on June 1, 1935, and that such operations were *"bona fide"* in character. The determination of the geographical or territorial scope of such operations clearly involves a question of fact which is within the province of the Commission's administrative discretion. The determination of whether the operations were *"bona fide"* in character also appears to involve a question of fact since the "grandfather clause" provision states that registration under any code of fair competition shall be evidence of *"bona fide"* operation.

> "and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of 'bona fide' operation to be considered in connection with the issuance of such certificate."
>
> *Interstate Commerce Act,* Part II, Sec. 206(a) *U. S. Code* 49, Sec. 306(a).

> " By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission."
>
> *U. S. v. Maher,* 307 U. S. 148, 153.

"It is further held that the determination of controverted matters of fact arising in whether a carrier was in bona fide operation within the immunizing period of the Statute, was entrusted to the Interstate Commerce Commission. See, *United States of America v. Maher, supra.* This court is, therefore, powerless to hear the evidence or to review the proof submitted to the Commission in the instant case."

Loving v. U. S., 32 F. Supp. 464.

C. Differentiation Between Classes of Carriers Was Not Only Authorized But Required.

In passing this Act to regulate interstate transportation by motor carriers, Congress clearly recognized that motor common carriers differed from one another in the nature and type of transportation service rendered to the shipping public and not only gave to the Commission authority to make a reasonable classification of motor carriers but also imposed upon the Commission a duty to determine, recognize and apply differentiation between carriers of differing types.

"The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term 'common carrier by motor vehicle,' or 'contract carrier by motor vehicle,' as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest."

Interstate Commerce Act, Part II, Sec. 204(b) *U. S. Code,* Title 49, Sec. 304(b).

In the "grandfather clause" of the Act (cited *supra*) Congress by express language differentiated between operations on the statutory "grandfather" date *"over the route or routes or within the territory* for which application is made." (Emphasis supplied.) Congress further provided that any certificate issued under the "grandfather clause" of the Act.

> "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate;"
>
> *Interstate Commerce Act,* Part II, Sec. 208(a). *U. S. Code,* Title 49, Sec. 308(a).

> "The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the 'route or routes' for which an application under the 'grandfather clause' is made as against operations 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini."
>
> *U. S. v. Maher,* 307 U. S. 148.

D. The Commission Had Substantial Evidence Before It Upon Which to Base the Order.

1. Fleming was a common carrier over irregular routes within a territory.

Fleming's application to the Interstate Commerce Commission for operating authority under the "grandfather clause" of the Act and his sworn testimony at public hearing on such application clearly showed that he was a common carrier of special commodities, namely automotive vehicles over irregular routes within a broad territory (R. 49, 51, 53, 83, 84).

2. Operations on or about the statutory "grandfather" date were conducted in all states embraced in the grant of authority.

The sworn allegations in Fleming's "grandfather clause" application indicated that common carrier operations in the transportation of special commodities were being conducted by Fleming on the statutory "grandfather" date to some point or points in all of the states embraced in the Commission's grant of authority (R. 51, 52, 53). These allegations were substantiated by Fleming's sworn testimony at public hearing on the application (R. 84). This testimony was further substantiated by the introduction in evidence of original shipping documents showing service to one or more points in each state embraced within the Commission's grant of authority, either shortly before or shortly after June 1, 1935, and in most instances both before and after the statutory "grandfather" date (R. 92-96, 109-118).

> "The hearing of evidence is an exclusive function of the Commission and it may disbelieve or disregard any evidence which to it seems unconvinc-

ing; it may give as much or as little weight to evidence as it deems proper. See, *Swayne & Hoyt Ltd., v. United States,* 300 U. S. 287; *Mississippi Valley Barge Co. v. United States,* 292 U. S. 282; *Western Paper Makers Chemical Co. v. United States,* 271 U. S. 269; *Manufacturers Ry. Co. v. United States,* 246 U. S. 457; *Pennsylvania Co. v. United States,* 236 U. S. 351. But, it must not act arbitrarily or capriciously in the considering of evidence presented to it."

Loving v. U. S., 32 F. Supp. 464.

3. Fleming's operations were "bona fide" in character.

Fleming's application for operating authority indicated that he was registered under a code of fair competition, namely the Trucking Code, on December 31, 1934 (R. 55). By the terms of the Act, such registration was some evidence of "*bona fide*" operations to be considered in granting the authority requested *(Interstate Commerce Act,* Part II, Sec. 206(a); *U. S. Code,* Title 49, Sec. 306(a)). Fleming testified at public hearing on his application that he had complied with all requirements that had been made upon him by the various state regulatory authorities (R. 85) and proceeded to state in detail the nature of his actions in complying with state regulatory legislation (R. 85-92). Fleming introduced into evidence documents indicating the manner in which compliance with state laws was made (R. 87-91). Fleming also testified on cross examination that before starting a movement into a new territory it had been his policy to inquire as to applicable state laws and that neither he nor his company nor any of his drivers had ever been arrested in any state for violating a law of the state pertaining to his operations or to a rule or regulation of a state regulatory body (R. 106, 107).

Question has been raised by Appellants as to the *"bona fide"* character of Fleming's operations because in the State of Oregon he held contract carrier authority while he applied for and received from the Interstate Commerce Commission common carrier authority. Further question is raised by Appellants as to this issue because Fleming admitted under cross examination that he represented himself to be the owner of vehicles when they were passing through Nebraska despite his conclusions of law on cross examination that he was not the owner of such vehicles. Further question was raised in the court below as to the lawfulness of Fleming's operations in Missouri because of his failure to obtain operating authority under an Act which was not construed to cover the transportation of motor vehicles by driveaway until December 1935, six months after the statutory "grandfather" date (R. 109).

It should be noted that Fleming, in his direct case, offered testimony and evidence indicating that some service was rendered to all states embraced within the Commission's grant of authority and that he had made some effort to comply with the regulatory laws in each state through which operations were conducted. No witness was offered to refute Fleming's testimony and no evidence was introduced to contradict Fleming's documentary evidence. The only state law introduced at the hearing on Fleming's application was the state law of Missouri and Missouri was the only state represented in opposition at the hearing. Neither Missouri nor any other state took any affirmative action in opposition to the Commission's grant of authority subsequent to the hearing on Fleming's application and no motor carrier protested or contested the Commission's action. The sole strength of appellants' case is predicated upon the alleged weakness of Fleming's case and appellants' sole basis for attack so

far as the evidence is concerned depends upon cross examination of Fleming for the production of inconsistent statements or the eliciting of legal conclusions which may not square with his statements of fact.

E. The Order Was Founded Upon Reasonable Standards Consistently Applied.

1. Broad operating authority granted to specialized haulers:

Pursuant to the authority granted to it by Congress in the Act (Interstate Commerce Act, Part II, Sec. 204(b); U. S. Code, Title 49, Section 304 (b)) the Commission issued a classification report, Ex Parte No. MC 10, on August 9th, 1937, classifying motor carriers of property on the basis of the type of service and method of transportation offered to the shipping public. The Commission indicated that its classification report was based upon a substantial investigation and study of the practices of the industry and that the report was promulgated under the theory that a practical classification

> "Must not only provide a satisfactory operating sphere for each kind and major type of operator now in existence, but it must also avoid the danger of establishing restrictions which might be burdensome to the industry. The public interest requires that the way be left open for normal, healthy growth. Any plan which would retard such growth would defeat the purpose of the Act. We have been fully cognizant of these facts throughout the course of our study of this matter."
>
> *Ex Parte No. MC. 10*, 2 M. C. C. 703 (704).

On the basis of its study and investigation the Commission recognized that "carriers of motor vehicles" constituted a major division of the industry and placed such carriers in

a special category comparable to the special category in which other specialized transporters were placed, as for example carriers of household goods, carriers of heavy machines, carriers of liquid petroleum products and so forth. In discussing carriers of motor vehicles the Commission stated:

> "Note.—The transportation of new automobiles, trucks, and trailers is usually a class C-9 movement (irregular route, radial service). The transportation of used automobiles, trucks, and trailers and new or used chassis, bodies and automotive display vehicles is usually a class D-9 movement (irregular route, non-radial service). In either case, the operation may be that of a common or contract carrier. When classified as a class D-9 movement, the scope of the operation is territorial in character and includes the transportation of motor vehicles to, from, and between unlimited points of origin and unlimited points of destination within the territory served by such carrier, over irregular routes, in either direction, outbound, or back haul, or in cross movements."
>
> *Ex Parte No. M. C. 10,* 2 M. C. C. 703 (712).

Fleming's operations being clearly within the classification of "carriers of motor vehicles," it was apparent that the authority to be issued to him should conform with the special characteristics above noted. In at least two cases involving carriers of motor vehicles decided by the Commission before the Fleming order was issued the Commission granted broad territorial authority under the theory that this type of carrier was entitled to such authority because of the special characteristics of the transportation service offered to the shipping public.

> "It obviously was not the intent of the Congress that a carrier must have been in physical operation to all points to which such carrier claims to have

rendered service on the exact date specified in the statute. It is apparent that if such were the intent and purpose of the 'Grandfather' clause provision, the effect would be to destroy the business of many small irregular operators, who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date."

George Cassens & Sons, 1 M. C. C. 771 (774).

"It is readily apparent that, in defining the territorial limits of a service, such as applicant's, involving a single commodity which does not move directly into the smaller towns because of the absence of dealer-agents, and, except in the larger cities, moves only to a single consignee in each of the towns where deliveries are made, a broader grant of authority is appropriate than in the case of services which involve the transportation of numerous commodities moving regularly to all points."

L. C. Robertson, 8 M. C. C. 32 (33).

Consistent with the classification report and in consistency with the standards established in the Cassens and Robertson cases the Trial Examiner in the Fleming case stated:

"It is necessary to take into consideration the type of operation, the frequency of the demand of the shippers for which the carrier hauls, and the needs of the public. The record is convincing that applicant's operations are irregular in nature and necessarily so because of the conditions in the industry. The same frequency of service which might be required of a general commodity hauler cannot be imposed on a carrier of a special commodity such as automotive vehicles, nor can operations be confined within the same narrow limits. To place on applicant the restrictions contended

for, might well destroy applicant's usefulness. The primary test in each case is the requirements of the public. As applicant points out, a restriction of his operation to fixed termini would seriously handicap the conduct of his business and tend to prevent him rendering the type of service which the industry requires. The particular operation requires great flexibility, both as to routes and as to points to be served. Under the circumstances it must be concluded that applicant is entitled under the 'Grandfather' clause to serve all destinations in each of the states for which application has been made without restriction of route."

Examiner A. E. Later's Report (R. 76).

The report of the Commission by Division 5 in the Fleming case also followed the principles established by its classification report and was in conformity with the principles enunciated in the Cassens and Robertson cases. Division 5 of the Commission stated:

"It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the states served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specific points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which automobile manufacturers have established distribution facilities. A manufacturer could not for many reasons appoint an indefinite number of dealers or distributors for a given territory. Approximately 1200 vehicles were transported by applicant in the period from Janu-

ary 1934, to June 1935, yet relatively few points were served. This further indicates that applicant's opportunity for service was found at a very limited number of distribution points. An exhibit introduced at the hearing contains figures and supporting data based upon which it is estimated that in the year 1935, less than seven per cent of all new automobiles sold in twenty-four western states were transported by the driveaway method.

As basis for authority to serve all points in a state, applicant points out that distribution points are constantly shifted from the standpoint of a state-wide area; dealers accounts changed; and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under Section 206 (a) of the Act, the provisions of which require in substance that the authority granted shall permit a carrier to conduct the *bona fide* operations it was conducting on June 1, 1935. In *Reliance Trucking Co. Inc., Contract Carrier Application*, 4 M.C.C. 954, we said that: 'In the case of a common carrier of household goods or of oil field supplies, serving a large territory over irregular routes, we grant certificates under the "Grandfather" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "Grandfather" certificates to haul "general commodities," that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "Grandfather" period consistent with the holding out in the natural and normal course of busi-

ness.' It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends, for its traffic, entirely upon one industry. This principle should obtain especially where the traffic in question is available only through the distribution and sales of such commodities as automotive vehicles.

Applicant was engaged in furnishing a highly specialized transportation service. Direct competitors appear to have been few in number, although the record contains no definite statement concerning this phase of the operating conditions. Applicant's service was, according to our view, necessarily confined to deliveries at a very few points, and future opportunities of obtaining traffic, no doubt, will be likewise limited. This is true even though applicant has at all times held his services out to the public generally."

Commission Report (R. 13 and 14).

Subsequent to the decision in the Fleming case the Commission was still applying these same principles in the decision of "Grandfather" cases involving carriers of motor vehicles. In a later case the Commission said:

"Protestants refer to the rather sporadic showing concerning movements to some of the states and especially to those where only one shipment was shown to have been transported prior to June 1, 1935. They urge that such evidence is insufficient to support a claim of 'Grandfather' rights to all points in the state. Under ordinary circumstances and in dealing with the average type of carrier which transports a number of commodities for the general public, or for a group of shippers from several origin points, protestants' contentions would possess considerable merit. In this instance, however, we are considering a very special type of service, which of necessity depends upon the frequency of demand for the particular commodity

transported. For obvious reasons a motor-vehicle manufacturer could not appoint an indefinite number of dealers or distributors in a given territory. Economic conditions require constant changing of such distribution points, and if applicant were granted operating rights only to those points served previous to June 1, 1935, it would constantly be before us for authority to serve new points. We are of the opinion that the same proof with respect to territory served that might be required of a general-commodity hauler cannot be imposed upon this type of carrier, nor can operations be confined within the same definite limits. Applicant's service was necessarily confined, because of the type of commodities transported, to a very few points compared to the large territory sought, and future operations will be likewise limited. Moreover, applicant has always held itself out to serve any and all points in the states claimed."

Kenosha Auto Transport Corp., 24 M. C. C. 753 (757).

2. Operations recognized as bona fide in absence of concealment, fraud, or wilful violation of law.

Congress failed to define in the Act the precise meaning of the expression "*bona fide* operation." The ordinary dictionary definition of the expression "*bona fide*" means "in good faith" or "without fraud or deceit" or "real, actual, genuine, honestly, openly, sincerely." This Court in the case of *Ware v. Hylton*, 3 U. S. 199 (214), said that the expression signifies a thing done in good faith without fraud or deceit or collusion. There is nothing in the Act which can lead to the belief that Congress used the expression in other than its ordinary sense.

In an early case, *Earl W. Slagle*, 2 M. C. C. 127, the Commission interpreted the expression "*bona fide* operation"

and has consistently followed the principles set forth in the Slagle case in its subsequent determinations. In the Slagle case the applicant sought authority under the "Grandfather" clause of the Act and rail protestants raised an issue as to whether Slagle's operations were in fact "*bona fide.*" After reviewing Slagle's actions with respect to state regulatory laws the Commission stated:

> "Prior to the passage of the Act, most of the states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulation, the situation was a most difficult one for the states, which was one of the reasons why their regulatory authorities very generally favored such regulation. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with the state laws a pre-requisite to rights under the 'Grandfather' clauses, and have indicated how we should determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase '*bona fide* operation,' making registration 'under any code of fair competition' evidence of such operation on June 1 or July 1, 1935, but saying nothing about state laws, which were not mentioned in committee reports or debates, in connection with the phrase '*bona fide* operation.' "
>
> *Earl W. Slagle,* 2 M. C. C. 127 (138).

> "Where the fact of noncompliance with state laws is admitted by an applicant or properly proved to us, we cannot accept protestants' contention that

this fact alone requires denial of an application under the 'Grandfather' clause. The words '*bona fide*' certainly make it necessary to consider also the mental attitude of the offender, for, where good faith is involved, the maxim 'ignorance of the law is no excuse' loses its force. We cannot ignore the facts that it has sometimes been difficult for motor carriers to keep fully informed in regard to the requirements of state laws, that some states have permitted rather general disregard of certain requirements, and that operators might in good faith challenge the validity of some state statutes affecting interstate commerce."

Earl W. Slagle, 2 M. C. C. 127 (140).

The Commission pointed out in the Slagle case that an adoption of the protestants' interpretation of the Act would require the Commission to exercise judicial functions in respect to state laws. In other words, to determine the fact of compliance or non-compliance, it would be necessary for the Commission first, to ascertain what the state law was; second, to construe that law; and third, to apply it as construed to the facts of the case. This would carry the further responsibility of determining whether the law itself was valid. As an illustration the Commission pointed out that Slagle was considered a contract carrier operator in Iowa but the Interstate Commerce Commission determined that he was a common carrier within the terms and provisions of the Interstate Commerce Act.

In the Slagle case the Commission made a finding that the applicant had paid various fees in substantial amounts in several of the states and had encountered various delays in obtaining permits, including delays caused by changes in the state laws, and he had difficulty in determining the extent to which he was subject to some of these laws, if at all. The Commission stated that the evidence established

the general willingness of the applicant to comply with state laws and the exercise of some diligence on his part to effect compliance. The Commission reasoned that to the extent the state laws are properly applicable to Interstate operations they can be enforced by the state and the Commission could assume that they have been and will be so enforced. The Commission also reasoned that one purpose of the use of the expression was probably to deny rights under the "Grandfather" clause to a carrier who, with knowledge of the impending legislation, should make a show of commencing operations, not in pursuance of any well conceived plan of furnishing transportation service, but for the purpose of thereby securing rights to operate having in themselves a money value.

> "As we read the Act, the particular provision now under consideration was intended to give a preference right to all operators in good faith, who had been operating without knowledge that the Legislature would so act, and to deny a preference right to those who, after the Legislature began the consideration of the subject, in bad faith commenced to act for the purpose of forestalling the legislative action."
>
> *State Ex Rel. Great Northern Ry. Co. v. Dept. of Pub. Wks.*, 219 Pac. 878.

After considering the steps taken by Slagle to comply with state regulatory laws the Commission reached the determination as a matter of fact that Slagle's operations were *bona fide* in character because they were openly conducted in an honest manner without concealment, fraud or deceit. The Commission has consistently applied this test in other decisions involving all types of carriers, sometimes arriving at the conclusion that the operations were *bona fide* and at other times arriving at the conclusion that the operations were not.

In the case of *D. L. Wartena*, 4 M. C. C. 619, the evidence indicated that the applicant claimed to be ignorant of state regulatory laws but had been operating trucks which bore the legend "not for hire" and the drivers of these trucks did not carry bills of lading and when they were stopped stated that they were operating for a private carrier. On these facts the Commission held that bad faith had been exercised and the operations were not *bona fide*. In the case of *A. E. McDonald Motor Freight Lines*, 21 M. C. C. 658, the Commission, following the decision of this court in case of *McDonald versus Thompson*, 305 U. S. 263, found that McDonald had been operating in defiance of the laws of the state of Texas and on the basis of such facts found that the operations were not *bona fide*. In the case of *Jay Rountree*, 22 M. C. C. 355, applicant did not hold state authority in the States of Texas and Arkansas, both of which States required the procurement of operating authority. Texas was enforcing its Act with respect to Interstate operators but the records showed that Arkansas was not enforcing its Act with respect to Interstate operations until sometime in 1939. On these facts the Commission found that the applicant was not in *bona fide* operation in the State of Texas but was in *bona fide* operation in the State of Arkansas because in Texas the carrier was operating in wilful violation of the Texas Act while in Arkansas the applicant was operating without concealment in violation of an Act which was not enforced against him. In the case of *Watson Brothers Transportation Co., Inc.*, 24 M. C. C. 679, the applicant held irregular route authority in the State of Iowa and was seeking authority from the Commission as a regular route operator. The Iowa Commission contended that the applicant was operating illegally in the State of Iowa and should have obtained regular route authority because of the increased frequency of the applicant's service. The Commission stated that while the appli-

cant may have conducted these operations without appropriate authority from the State of Iowa there was no evidence of evasion, deceit or defiance and the Commission therefore concluded that the operations were *bona fide*.

These principles for determining whether or not operations were *bona fide* in character were applied to the facts of record in the Fleming case. The Trial Examiner in determining this issue made reference to the Slagle case and then stated:

> "The true test of *bona fide* operation was held to be actual operation in the conduct of a legitimate transportation business for hire without subterfuge, deceit, or concealment. Applicant's operations fully meet the test of *bona fide* operation as laid down in the above cited case."
>
> *Trial Examiner A. E. Later's Report* (R. 75).

The Commission, by Division 5, also considered this issue and made a finding that the applicant had made inquiry as to certificate requirements of the various states and testified that to the best of his information certificates were not required with one or two exceptions, and pointed out that the applicant had offered in evidence receipts for taxes paid in various of the states. The Division then concluded that compliance by applicant with applicable laws of the states was a matter resting between the applicant and the state authorities (R. 14, 15).

F. No Erroneous Construction of the Act or Faulty Interpretation of Its Provisions Is Evident.

1. Grandfather cases warrant liberal interpretation of the expression "within the territory."

The obtaining of a certificate of Public Convenience and Necessity under the "Grandfather" clause of the Act upon mere compliance with procedural rules outlined by the Commission is a matter of right by the very terms and provisions of the Act. The receipt of authority coextensive with the operations conducted by an applicant on the statutory "Grandfather" date is a right conferred by Congressional Act and does not rest upon the grace of the Commission. The "Grandfather" clause was inserted in the Act for the protection of existing motor carriers and not out of any consideration of public convenience and necessity.

> "The purpose of the Act is regulatory, and we believe that the 'Grandfather' clause was included therein for the benefit of carriers who had been in *bona fide* operation on and prior to the 'Grandfather' date, rather than for the serving of public convenience."
>
> *Loving v. U. S.*, 32 F. Supp. 464.

It would be error for the Commission to so limit the authority granted to an applicant under the "Grandfather" clause of the Act as to deprive the applicant of some portion of the transportation service rendered on the statutory "Grandfather" date. In connection with such an attempt on the part of the Commission the United States District Court for the western district of North Carolina has said:

> "Being a common carrier of general freight during the 'Grandfather' period, it (the applicant) became entitled to a certificate on the same basis;

> and we see nothing in any language of the Act which justifies the Commission in limiting the certificate to the points served and the specific commodities transported. 'Grandfather' clauses are quite customary when the state first undertakes the regulation of an industry or profession; and so far as we are advised the position taken by the Commission with respect to these cases is quite without precedent. It is just as though a physician entitled to continue his practice under the 'Grandfather' clause of a statute regulating the practice of medicine should be told that he could practice only in the homes which he had formerly visited in his practice and would be allowed to treat only the diseases which he had formerly treated. We feel perfectly sure that if any such interpretation of the Act had been suggested at the time of its consideration by Congress, it would never have been passed."
>
> *Carolina Freight Carriers Corp. v. U. S.*, 38 F. Supp. 549.

In determining the scope of the territorial operations of an irregular route motor carrier seeking rights under the "grandfather" clause of the Act, the Commission should be liberal in its interpretation rather than narrow, because a narrow interpretation might deprive an applicant of rights granted to the applicant by act of Congress; while the most that a too liberal interpretation could result in would be to confront competitive transportation agencies with an additional degree of competition not theretofore experienced, which would present no legal damage, since competitive carriers, at least competitive motor carriers, have no right of monopoly in the conducting of transportation operations.

> "No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways."

Interstate Commerce Act, Part II, Sec. 207(b).
U. S. Code, Title 49, Sec. 307(b).

A similar degree of liberality should be exercised by the Commission in determining the question of *"bona fides"* because a narrow interpretation might deprive an applicant for "grandfather" rights of certain operating authority on the basis of non-compliance with the state regulatory law which might subsequently be determined invalid or inapplicable. In such event the injury would be irreparable. Particular care should be taken by the Commission not to make a determination that operations were unlawful where the Commission has before it no evidence that unlawfulness has been claimed by the State Commission and no evidence that proceedings have been instituted in the State to penalize the unlawfulness. In applying this argument to the Fleming case it should be noted that Fleming testified on cross examination that neither he nor his company nor any of his drivers had ever been arrested in any state for violating a state regulatory law (R. 107).

2. The expression "territory" was not construed by the Commission to mean "states."

Appellants urged in the court below that the Commission had erroneously construed the expression "within the territory" to mean "within the states." No language used by the Commission in the Fleming case justifies such an argument and it would appear to be based upon an inference from the fact that the Commission, in fact, used state boundaries for the purpose of defining the grant of authority in the Fleming case. That the Commission did not use such a test and did not adopt the interpretation which Appellants attribute to it is evidenced by the fact that the Commission in its report discusses the question

of whether Fleming should receive state-wide authority although the evidence clearly shows that Fleming had served some point or points in each of the states covered by the grant of authority. If the Commission had adopted the interpretation attributed to it, its discussion of the problem in its report (R. 12, 13, 14) would have been a useless waste of time.

Further evidence that the Commission did not adopt the interpretation attributed to it can be found by reference to the Cassens case and Robertson case hereinbefore cited. In the Cassens case the applicant sought to serve the lower two-thirds of the State of Illinois and showed substantial service to many points in that state. The Commission confines the Cassens authority to service below a line drawn approximately twenty to forty (20 to 40) miles south of the northern boundary of the territory sought to be served by the applicant. If the Commission thought that the expression "within the territory" was the same as "within the states" it is unexplainable why the Commission did not grant Cassens the entire authority requested since the request involved less than a full state. On the other hand, in the Robertson case, the applicant sought to serve all points in the State of Arizona and the Commission discussed at some length whether to grant the northeastern portion of the State of Arizona in view of the fact that most of the service had been performed in other portions of the state. The Commission finally concluded that Robertson should receive state-wide authority. Here again the Commission could not possibly have adopted an interpretation which is attributed to it by Appellants.

It is submitted that the Commission did not grant Fleming territorial authority, state-wide in scope, on the basis of any erroneous interpretation of the meaning of the

expression "within the territory" but on the contrary determined that the nature of the specialized service performed by Fleming on the statutory "grandfather" date required a grant of authority to the extent covered in its order in order not to destroy the usefulness of Fleming's specialized service. Support for this position may clearly be found upon careful reading of the Commission's decision in the Fleming case (R. 13, 14, 16).

3. Lawfulness recognized as an element of a "bona fide operation."

Reviewing again briefly the Commission decisions which have been cited above in which the issue as to the *bona fide* character of operations has been raised, it is apparent that the Commission has not, in its interpretation of the phrase "*bona fide* operation," disregarded the question of lawfulness. On the contrary it would appear that the Commission recognized lawfulness or unlawfulness as an element to be considered in connection with the attitude of the carrier where that attitude could be determined from the facts of record. In the Slagle case, the Commission determined from the facts of record that Slagle was attempting to comply with all state regulatory laws and consequently although there may have been technical infraction or non-compliance, that Slagle's attitude was not defiant and therefore his operations were *bona fide*. In the Wartena case, violation of regulatory state laws, coupled with deliberate misrepresentations that the operations were not for hire, was found by the Commission to destroy the applicant's claim that the operations were *bona fide*. The Commission's decision in the McDonald case was in full conformity with the Supreme Court's decision to the effect that McDonald had been operating in defiance of the state authorities, and this attitude of

defiance, coupled with unlawfulness of the operation, destroyed the claim of *bona fides*. In the Fleming case the Commission also reached a determination based upon the facts of record that Fleming had made an effort to determine what regulatory laws applied to him and paid substantial taxes in a number of states. The Commission reasoned that Fleming's attitude was proper and that the question of technical compliance with state laws was a matter which rested between Fleming and the individual states (R. 14-15).

Had any of the state authorities in the states which Fleming was serving or through which Fleming was passing, desired to prohibit the use of their highways prior to the Commission's decision and based upon a claim that the operations were unlawful, the state authorities would have been at liberty to do so. *Eichholtz v. Public Service Commission*, 306 U. S. 268. It should be remembered that Fleming had testified that neither he nor his company nor any of his drivers had ever been arrested in any state for violating a state regulatory law (R. 107). This testimony was given by Fleming on July 23, 1936 (R. 83) although protests had already been filed in the case by the Texas regulatory body February 21, 1936 (R. 57); by the regulatory body of Missouri on May 21st, 1936 (R. 60); and by the Ohio regulatory body on April 14, 1936 (R. 61). The record will indicate that neither Texas nor Ohio pursued their respective protests and the application of the Missouri law has been considered hereinbefore. For the Commission to have determined that Fleming was in violation of applicable state laws, which would negative his claim that his operations were *bona fide*, the Commission would have been forced to reach such determination upon its own interpretation of the state laws, without any prior determination by either the courts or the regulatory bodies of the respective states.

It has been urged that this court in its decision in *McDonald v. Thompson*, 305 U. S. 263, in effect questioned the validity of the Commission's determination in the Slagle case. We do not believe that this court's decision is subject to such construction. It is to be noted that in the McDonald case this court in interpreting the expression "*bona fide* operation" as used in the Act, said:

> "To limit the meaning to mere physical operation would be to eliminate '*bona fide*.' That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208, *Ex Parte Public Bank*, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. The expression 'in *bona fide* operation,' suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a state in defiance of its laws."
>
> *McDonald v. Thompson*, 305 U. S. 263.

We interpret this language to mean that mere physical operation alone does not constitute a *bona fide* operation if the facts of record disclose a defiant non-recognition of the power of a state to withhold or condition the use of its highways. We further construe the language to mean that mere recognition of state regulatory laws and compliance therewith does not constitute a *bona fide* operation if there is a mere holding out of a potential service or a simulated service. Assuming this interpretation to be

correct, we believe that this court has set up the same standard as that set up and observed by the Commission in the Slagle case and followed in the Fleming case, namely that all of the facts of record must be taken into consideration, lawfulness of the operation being but one of the elements for consideration. Neither Slagle nor Fleming evidenced a defiant attitude toward state authority or conducted themselves as though they failed to recognize the power of a state to withhold or condition the use of its highways. We submit that a contrary decision by the Commission in the Slagle and Fleming cases would be in violation of this court's decision in the *McDonald v. Thompson* case.

G. A Full, Fair and Impartial Hearing Was Afforded.

In the Fleming case, application was filed by Fleming within the time limited in the Act, seeking operating authority under the provisions of the "grandfather clause" of the Act (R. 44). Public hearing on this application was held July 23, 1936, at which counsel for Appellants appeared and participated in the examination of witnesses (R. 83). After this public hearing briefs were filed by various parties to the proceeding (R. 69) and under date of September 10, 1937, a detailed and extensive report and recommended order was issued by the Commission's Trial Examiner setting forth many findings of fact and conclusions of law (R. 68). To this report and recommended order exceptions were filed on behalf of most of the Appellant carriers (R. 78).

Presumptively the Commission gave careful consideration to the application, the testimony of record, the Examiner's report, the Briefs filed in the case and the Exceptions filed in the case. On December 19, 1938, the Commission by Division 5 entered its determination in a

detailed report and order containing many findings (R. 8). The Commission's order confirmed in most essential details the Trial Examiner's report and recommended order. Two petitions for reargument were filed on behalf of rail carrier protestants most of whom are Appellants in this action, which petitions were considered and denied by the Interstate Commerce Commission (R. 79; also Appellants' statement of case, page 4 of appellants' brief).

In view of the foregoing it should be apparent that the Commission did not act arbitrarily or capriciously or with undue haste in entering its decision in the Fleming case. It is equally apparent that the Commission had before it in briefs, exceptions, and petitions for reconsideration, all vital issues for determination. No claim can now be made that the Commission did not have before it and pass upon all elements necessary for a proper disposition of the case, and under these circumstances, we submit that the administrative findings of the Commission should not now be disturbed.

II.

THE DISTRICT COURT DECREE, INSOFAR AS IT ADOPTS THE FINDINGS AND AFFIRMS THE CONCLUSIONS OF THE COMMISSION, CONSTITUTED FULL JUDICIAL REVIEW OF THE ADMINISTRATIVE ACTION IN SOUND CONFORMITY WITH ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW

A. Full Judicial Review of the Administrative Action Was Afforded.

Following the Interstate Commerce Commission's denial of two petitions filed on behalf of all but four of the Appellants seeking reconsideration of the Commission's order of September 19, 1938, in the Fleming case, Appellants sought judicial review of the Commission's administrative action through the filing of a detailed and informative Bill of Complaint under the appropriate provisions of law providing for such review, namely, 28 U. S. C. 41 (28) (R. 1). To this Complaint answer was made by the United States (R. 22), by the Interstate Commerce Commission (R. 26) and by the individual John P. Fleming (R. 18).

In due course of time a special constituted District Court of Three Judges composed of the Honorable Charles C. Simons, United States Circuit Judge; Honorable Edward J. Moinet, United States District Judge, and Honorable Frank A. Picard, United States District Judge, was convened pursuant to Sec. 47, Title 28, U. S. C. A. on the 26th day of November, 1940, at Detroit, Michigan, and hearing was had. The hearing was participated in by counsel representing the railroad Appellants, the United States, the Interstate Commerce Commission, and the individual John P. Fleming. Full opportunity was afforded to and utilized by counsel for all parties to the

proceeding to present the issues in the case and their arguments in connection therewith. Following the hearing, and pursuant to leave granted by the court, briefs were filed by all parties to the proceeding, further outlining the position of each party.

On January 31, 1941, after several weeks deliberation, the District Court rendered and filed its opinion (R. 29). This opinion sets forth in some detail the positions of the parties, the findings of the District Court, and the District Court's ultimate conclusions to the effect that the Commission's order in the Fleming case, except as modified to some slight degree, should be affirmed. Judgment and decree was entered by the Court April 7, 1941 (R. 36).

Thus it will be observed that Appellants have been afforded full judicial review of the Commission's administrative action as provided by Congressional statute. The principle question then before this Honorable Court would seem to be the matter of determining whether error was committed by the District Court in its judicial review of the Interstate Commerce Commission's administrative action.

B. Validity of the Commission's Action, Except as Modified, Was Affirmed.

A determination of whether or not the District Court committed error in its judicial review of the Commission's administrative action first requires an examination of the Court's opinion to ascertain the basis for its subsequent decree. The court in its opinion first makes reference to the statutes under which the action was commenced, then identified the parties to the proceeding, and follows with a short review of the administrative action to be reviewed. The first issue to be discussed by the court involved the question of whether the railroad Appellants were parties

in interest to maintain the suit and the Court found affirmatively on that issue.

The court, in its opinion, next makes reference to the provisions of the Interstate Commerce Act, Part II, and in particular the provisions of the "grandfather clause"; sets forth Appellants' contentions as to the error allegedly committed by the Commission in its interpretation and application of such language; and reviews the findings of the Commission. Among the findings of the Commission which are repeated by the court and ultimately adopted as its own are the following:

(1) Fleming had commenced operations during the early part of 1933, from which time to July, 1936, he had transported or participated in the transportation of more than 2100 vehicles (R. 32).

(2) He had also transported used cars between various points in the states covered by his application (R. 32).

(3) In each of the states, save one, in which deliveries are authorized by the Order, there had been shipments prior to the crucial date, June 1, 1935, and shipments thereafter prior to the date of the hearing (R. 32).

(4) As to many of the states, the applicant had transported numerous shipments to the points served (R. 32).

(5) Fleming was engaged in a highly specialized transportation service with few direct competitors, and but 7% of all new automobiles sold in twenty-four western states were being transported by the method in which the applicant was engaged (R. 32).

(6) Distribution points are constantly being shifted from the standpoint of a state-wide area; dealers' accounts are frequently changed; sales volume at given points may show rapid increases or decreases (R. 33).

(7) The result of a shift in distribution point would leave the applicant without authority to serve an account theretofore served, and render the carrier unable to continue an operation which he had been conducting (R. 33).

(8) The applicant's operations had been and would continue to be irregular in nature because of the conditions under which he might secure traffic (R. 33).

(9) Fleming had made inquiry as to certain state requirements, some of which were still pending at the time of the hearing (R. 34).

(10) Receipts for taxes were introduced and Fleming held permits in some states (R. 34).

(11) In a few of the states, notably, Missouri, there may have been temporary, inadvertent, or purely technical operation without sanction of local law (R. 34).

In addition to the court's acceptance and adoption of the Commission's findings of fact, it is apparent that the court made an independent review of the record because the court itself made additional findings of fact independent of the Commission's findings. For example, the court found:

(1) The statute neither expressly nor by implication gives connotation to the phrase "within the territory" (R. 33).

(2) No standard is found whereby the area is to be delimited, and Appellants have been unable to suggest criteria by which the Commission must be governed (R. 33).

(3) It is general knowledge that in many industries distribution points are determined for areas coextensive with state boundaries (R. 33).

(4) The Commission had made exhaustive studies of motor carrier transportation service and it must be assumed it has become expert in that field (R. 33).

(5) Fleming's operations were in recognition of state law (R. 35).

(6) There is no evidence that Fleming's inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority (R. 35).

Further evidence that the court carefully reviewed the record in the light of established principles of administrative law is indicated by the fact that the court reached certain conclusions and discussed its conclusions with reference to judicial determinations which have been made in connection with similar issues. This phase will be discussed in the next division of our brief.

C. Established Principles of Administrative Law Were Observed.

1. Much weight should be given to the Commission's construction of the Act.

In construing the language used in the "grandfather clause" of the Act the District Court concluded that "decision upon the substantial character of the applicant's business must be considered as having been committed to the judgment of the administrative agency entrusted by the Act with regulation and enforcement" (R. 32). The District Court's conclusion finds support in the decision of this court in *United States v. Maher,* 307 U. S. 148. The District Court made a finding that the Commission had made exhaustive studies of motor carrier transportation services and that it must be assumed the Commission has become expert in that field (R. 33). Based upon this

finding the District Court apparently felt that the findings of the Commission were entitled to great weight and support for this position is also to be found in the adjudicated cases. Peculiar weight is to be given to administrative interpretation of legislation

> "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."
>
> *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315.
>
> *United States v. American Trucking Associations Inc.*, 60 S. Ct. 1059.
>
> *Loving v. United States*, 32 F. Supp. 464.

2. The Commission's findings of fact should be conclusive.

The District Court cites *United States v. Maher, supra*, as authority for the conclusion that the determination of "*bona fide* operation" is a question of fact (R. 34). The District Court had previously concluded that the determination of territorial scope of the operations was also a question of fact as we have above indicated. The District Court then stated: "In our application of the now familiar rules governing review of factual findings by administrative bodies, we are unable to see that the findings of the Commission are unsupported by substantial evidence, and in this respect they will be sustained except as to operation in the State of Arkansas" (R. 32, 33). The familiar rules to which the District Court referred have been established by a number of cases including the following:

> *Virginia Railway Co. v. United States*, 272 U. S. 658, 663.

Western Paper Makers Chemical Co. v. United States, 271 U. S. 268.

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541.

The New England Divisions Case, 261 U. S. 184.

3. The judicial function is exhausted when a rational basis for the Commission's conclusion is found.

The Commission's basis for granting Fleming authority to serve all points in a state, although actual operation had been limited to only certain fixed distribution points in each state, is discussed by the District Court in some detail in its opinion (R. 33). It is evident that the District Court reviewed the record carefully to determine whether the basis used by the Commission was rational because it did not affirm completely the findings of the Commission but in fact determined that the Commission had committed error in granting Fleming authority to serve all points in the State of Arkansas. The District Court's adoption of the Commission's findings with respect to all other states embraced in the grant of authority indicates that the District Court believed the Commission had found a rational basis for its order.

The judicial function is exhausted when there is found to be a rational basis for the conclusions adopted by the administrative body.

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282.

4. It is not the function of the Court to substitute its judgment for that of the Commission.

The District Court having found a substantial basis for the Commission's decision, with no error being indicated except with reference to the grant of authority to serve the State of Arkansas, the District Court was correct in not attempting to substitute its judgment for that of the Commission. The District Court pointed out in its opinion that the Act did not define the meaning of the phrase "within the territory." It further pointed out that no standard is found whereby the area is to be delimited and Appellants have been unable to suggest criteria by which the Commission must be governed (R. 33). In this connection, it should be noted that Appellants, in the lower court and here, admit that the Commission's order was correct in some respects but urge that the Commission went too far in granting territorial authority. This court has said

> "The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the Court."
>
> *The Los Angeles Switching Case*, 234 U. S. 294, 314.

5. A contrary ruling would establish a precedent for judicial review of all "grandfather" orders.

It should be fairly obvious that a large majority of cases involving a determination of "grandfather clause" applications under the Act would impose upon some person or body the very difficult task, not only of interpreting the Act, but also of reviewing all the evidence in each case to determine the exact geographical or territorial extent of operations conducted by an applicant over a considerable period of time both before and after the statutory "grandfather" date, which in turn would require determination of whether such operations were *bona fide* in character. The question then naturally arises as to who shall make such determination and by what standards. The Commission's Trial Examiner in the Fleming case undertook such determination and his determination was, in substantial measure, affirmed by the Commission through Division 5. The Appellants, being dissatisfied with such determination by the Commission sought through exceptions and petitions for reconsideration to substitute Appellants' judgment for that of the Commission. Failing in this, Appellants have sought to substitute the judgment of the United States District Court for that of the Commission's. Again Appellants have failed except for the minor modification hereinbefore indicated.

We submit that a contrary position on the part of the District Court would have opened the door for review of a vast majority of "grandfather clause" cases under the Act which would have handicapped seriously the administration of the Act and would have imposed an intolerable burden upon the courts. Thirty-five years ago this court had occasion to review some administrative action taken by the Interstate Commerce Commission and the court said:

"Counsel for appellants in his oral argument made the declaration that it would not be necessary for this court to open the pages of testimony contained in the record, and says in his supplemental brief:

'I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this court.'

To what, then, shall we resort? How shall we determine what 'principles of transportation law' were involved? How determine whether they were recognized and applied, or denied and rejected by the Commission, and, necessarily by the Circuit Court? An examination of the testimony by concession of counsel is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648; *East Tenn. etc. Railroad Co. v. Interstate Commerce Commission*, 181 U. S. 1, 27. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission which, in addition to 'knowledge of conditions, of environment and of transportation relations,' has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the Circuit Court."

Illinois Central Railroad Company v. Interstate Commerce Commission, 206 U. S. 441, 454.

Here also the question might be asked, "to what shall the court resort?" The Act directed the Commission to grant operating authority to applicants for "grandfather" rights which would cover the *bona fide* operations conducted by such applicant on the statutory grandfather date June 1, 1935. The Act does not establish the standard for determining the territorial scope of such authority. Shall such determination be made by the Commission or by the courts? In particular, where the Commission has made a determination and the specially constituted District Court of Three Judges has examined such determination, shall the Supreme Court reject such determination, as reinforced by the concurrent judgment of the District Court, and redetermine the matter?

Unless judicial review is limited to the testing of the validity of the Commission's order upon the evidence which was before the Commission at the time of its hearing, the Commission will become a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

> *United States v. Louisville & Nashville Railroad Co.*, 235 U. S. 314.
>
> *Noeding Trucking Company v. United States*, 29 F. Supp. 537.

We do not believe that the Supreme Court of the United States wishes to reduce the Interstate Commerce Commission to the status of a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action, nor do we believe that the Supreme Court of the United States wishes to take upon itself or to impose upon the District Courts the burden of determining the exact extent of interstate motor carrier transportation as it was conducted on June 1, 1935.

CONCLUSION

The District Court, after full judicial review of the administrative action of the Interstate Commerce Commission has reached a determination that the Commission's action in the Fleming case was valid, except as modified, and has concluded that it should not substitute its judgment for that of the administrative body. Based upon the precedents of this Honorable Court, we respectfully submit that the District Court's position should be approved by this Honorable Court's affirmance of the District Court decree.

Respectfully submitted,

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Dated: Detroit, Michigan,
December 10, 1941.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLEES

No. 267

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVEAWAY SERVICE, APPELLANTS

v.

THE ALTON RAILROAD COMPANY ET AL., APPELLEES

APPEAL AND CROSS APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the specially constituted District Court (R. 29) is reported in 36 F. Supp. 898. The

court's judgment and decree appear at R. 36. The report of the Interstate Commerce Commission (R. 8), hereinafter called the Commission, is reported in 8 M. C. C. 469.

JURISDICTION

The final decree of the District Court (R. 36) was entered April 7, 1941, and the appeal was allowed April 21, 1941 (R. 42). The cross appeal was allowed June 6, 1941 (R. 21). Probable jurisdiction of both the appeal and cross-appeal was noted October 13, 1941. The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; 28 U. S. C. Supp. III, secs. 45 and 47a) and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., sec. 345).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS

The Commission, acting under the so-called "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935 (Part II of the Interstate Commerce Act) issued to appellee motor carrier a certificate of public convenience and necessity authorizing the continuance by it of operations as a common carrier in driveaway service of

new automotive vehicles and chassis over irregular routes from Detroit, Mich. to points in eleven designated States, and of rejected vehicles and chassis from any points in those States back to Detroit. The lower court, entertaining the suit brought by appellant railroads over objections questioning their standing to maintain it, upheld the certificate as in all respects valid "except as to operation in the State of Arkansas."

The questions presented in the appeal by the railroads from the lower court's decree insofar as it upholds the Commission's authorization of the carrier's operations are:

> (1) Whether the evidence supported the Commission's finding that the carrier had been in bona fide operation on the "grandfather" date and since that time to all points in any of the States named.
>
> (2) Whether the evidence supported the finding as to any points in certain of those States.
>
> (3) Whether the Commission, in authorizing the operations to all points in a State on evidence of actual shipments to a few points only, misconstrued the statute.
>
> (4) Whether the Commission erred in holding that the carrier's operations had been bona fide in certain territory despite its failure, alleged by appellants, to comply with certain laws in Oregon and Nebraska.

The questions presented on the cross-appeal are:

(1) Whether appellants had standing to maintain the suit.

(2) Whether the lower court's action in setting aside the Commission's authorization "as to operation in Arkansas," based upon a weighing of the evidence of its own, was not error.

STATEMENT

The appeal and cross-appeal herein are direct appeals from a final decree (R. 36) of the court below dismissing in part, and granting in part, a petition filed by the Alton Railroad Company and other railroads to enjoin and set aside an order entered by the Commission in a proceeding entitled *John P. Fleming Common Carrier Application*, No. MC 48654, 8 M. C. C. 469. The railroads are appellants in No. 110; the United States, the Commission and John P. Fleming, doing business as John P. Fleming Driveaway Service, are appellants in No. 267.

The Commission's order, or certificate (R. 17), authorized the continuance by the applicant motor carrier of operations as a common carrier in driveaway service of new automotive vehicles, finished and unfinished, and new automotive chassis from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas and Washington, on the other

hand, over irregular routes through the states of Idaho, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, Ohio, Oklahoma, Utah, Virginia, and Wyoming. As an incident to such operations, the certificate authorized the applicant to "transport to Detroit from any points in the States to which service is herein authorized, any new vehicle or chassis that has been rejected by a dealer or distributor."

The Commission proceeding, in which the order was entered, was instituted by application filed by the carrier February 12, 1936, under the so-called "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, asking authority to continue operation as a common carrier in driveaway service of automobiles, trucks, chassis, unfinished automobiles and all other automotive vehicles over irregular routes between points in States therein designated, including the eleven States first above named. Section 206 (a) provides that "no common carrier by motor vehicle shall engage in any interstate or foreign operation on any public highway * * * unless there is in force, with respect to such carrier, a certificate of public convenience and necessity, issued by the Commission, authorizing such operations." This is subject to the proviso (the "grandfather" clause) to the effect that if any such carrier was in bona fide operation on June 1, 1935, "over the route or routes or within the territory for which application is made," and has so operated since that time, except

as to interruptions over which it has no control, the Commission shall issue such certificate without requiring further proof of public convenience and necessity. Pending determination of the application the applicant is authorized to continue operations. Section 208 (a) provides that the certificate issued under section 206 (a) shall specify the service to be rendered, and "in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate."

The Public Service Commission of Missouri intervened in opposition to the granting of the application. The Railroad Commission of Texas protested the granting of the application, but was not represented at the hearing. National Automobile Transporters Association, Automobile Contract Carriers Association, and International Harvester Company intervened and presented testimony on questions relating to jurisdiction. Numerous motor carriers of automobile vehicles, individuals, Nicholson Universal Steamship Company, Detroit-Cleveland Navigation Company and Central Freight Association, western, and southern rail lines, and numerous railroads entered appearances at the hearing, but did not present any evidence (R. 10). A hearing was held before a Commission examiner, in which a number of protestants participated, including most of the railroads, appellants herein. A considerable volume of evidence, both oral and documentary, was re-

ceived. A proposed report was prepared by the examiner, to which the railroads and other protestants excepted and filed exceptions and brief. In January 1938 the exceptions to the examiner's report were orally argued before Division 5 of the Commission, and on September 19, 1938, the Division made its report and order, granting the application to the extent of authorizing the operations above described and denying it except to the extent so granted.

The authority conferred limited the transportation to new vehicles, finished or unfinished, and new chassis, and limited the operation to transportation from the one origin point, Detroit, except that new vehicles or chassis, rejected by dealers or distributors at points in the destination States were authorized to be transported back to Detroit. Concerning the limitations the report reads:

> "It also appears from the testimony that applicant transported used cars in interstate commerce between various points in the States covered by the application. Transportation of this character is not supported by documentary evidence, and the oral testimony does not warrant the conclusion that it was other than sporadic or that applicant was regularly engaged in such transportation. Certain new cars were returned to Detroit for various reasons. The return of vehicles refused by distributor or dealer would appear to be a necessary incident to the business in which applicant is engaged."

The application, as covering operations to points in the States of New York and Pennsylvania, was denied because the evidence of operations on and subsequent to June 1, 1935, was considered inadequate "to establish a valid claim to grandfather rights" with respect to such States (R. 16); and, as covering points in Michigan, was denied except as to Detroit, the originating point of the traffic.

By the "driveaway" method of operations, the transportation is performed (1) by individual driving of the vehicle under its own power, (2) by driving one vehicle under its own power and towing a second and (3) by driving one vihicle under its own power and upon which another vehicle is partially (front wheels) or wholly mounted, or combinations of both (R. 10). While certain parties contended at the hearing that these methods of conveying the traffic did not constitute transportation within the jurisdiction conferred by the Act, they abandoned the contention after issuance of the Examiner's report. The Commission, however, considered it to be desirable to discuss the question briefly and said:

> "* * * As indicated below, no question appears to exist, so far as towing of a vehicle is concerned. The dictionary definition, in a limited sense, however, leaves the impression that 'transportation' may be something other than the movement of an automotive vehicle under its own power.

Corpus Juris defines 'transporting' as follows:

> As commonly understood, one is transporting an article when he is conveying it from one place to another. Transporting includes towing.

In their interpretation of federal statutes making transportation of a stolen motor vehicle, in interstate commerce, a criminal offense, the courts have uniformly held in sustaining convictions that driving of the vehicle under its own power is transportation. See *Whitaker* v. *Hitt*, 285 F. 797, *Hostetter* v. *United States*, 16 F. (2d) 921, and *Piper* v. *Bingamon*, 12 F. Supp. 755. We conclude that the methods followed by an applicant in conveying the vehicles from one place to another constitute transportation within the meaning of the act. It makes no difference whether certain vehicles are towed by other vehicles or whether all operate on their own power.

Under Part I, we have consistently regarded the movement over other than the owning railroad of locomotives under their own power as transportation. Tariff rates for such transportation are provided by rail carriers, and in certain instances we have approved a basis of rates therefor. See *Investigation and Suspension Docket No. 23*, 21 I. C. C. 103, and *Locomotives from and to the South*, 211 I. C. C. 114." (R. 11).[1]

[1] The transportation of vehicles of transportation (cars moving on their own wheels) was considered in *Louisville*

The motor carrier, in conducting its operations into or through the States involved, is shown to have proceeded in recognition of State law. Answering the contention of the protesting railroads that it had failed to obtain certificates from the States, the Commission said:

> "Applicant, however, made inquiry as to certificate requirements of the States and he testified that, to the best of his information, certificates were not required, with one or two exceptions. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, and Arkansas were introduced and applicant holds certain permits issued by the States of Oregon and Nebraska" (R. 14).

The carrier's operations in a few States, notably Missouri, presented some particular circumstances, but nothing that could warrant a finding different than the finding made by the Commission that the carrier had been engaged in bona fide operation into, or through, those States.

& Nashville R. R. et al. v. United States (Private Passenger, or Office, Car Case), 282 U. S. 740; reviewing *In re Use of Private Passenger Train Cars*, 155 I. C. C. 775; 786-789.

The Driveaway method is generally used together with truckaway service (R. 70).

Historical Discussion, Examiner's Report, R. 69, 70.

Other cases involving applications for Driveaway authorizations are: *D. L. Wortena, Inc., Common Carrier Application*, 4 M. C. C. 619, 620; *Caravans, Inc., Com. Car. Application*, 9 M. C. C. 659; *Fugate & Girton Driveaway Co., Inc.*, 27 M. C. C. 623; *Myers Com. Car. Application*, 23 M. C. C. 451; *Barnett's, Inc., Com. Car. Application*, 22 M. M. C. 663.

In granting to the motor carrier authority to serve all points in a State, although operations during the "grandfather" period had been to a limited number of distribution points in the State, the Commission took into consideration the highly specialized nature and characteristics of the particular transportation service, the type of operation engaged in, the infrequency of demands of consignees, and especially the fact that distribution points are constantly being "shifted." The Commission said: "Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206 (a) of the Act * * *" (R. 13).

Following the issuance by the Commission, Division 5, of the report and certificate, September 19, 1938, the railroad interveners filed a petition for reargument and reconsideration by the entire Commission; this was denied December 5, 1938. Subsequently, after the decision of this Court in *McDonald* v. *Thompson*, 305 U. S. 263 (R. 4), the said railroads filed a supplemental petition for reargument and reconsideration by the entire Commission, which was denied March 6, 1939 (R. 4).

Proceedings in the Lower Court

The petition, asking that the Commission's certificate be enjoined and set aside was filed July 14, 1939, by numerous railroads, including those which were interveners in the Commission proceeding. (R. 4.) The defendants, the United States, the Commission, and the motor carrier filed answers to the petition (R. 18, 22), which answers included the affirmative defense that the plaintiff railroads were without standing to institute and maintain the suit. November 26, 1940, the hearing before the specially constituted three-judge court was held at Detroit, Michigan, at which hearing a certified copy of the record made before the Commission was introduced in evidence and the case was orally argued and submitted for decision. January 31, 1941, the court rendered its opinion in which, after holding that the plaintiff railroads had standing to bring and maintain the suit, it held that the certificate of the Commission authorizing the motor carrier operations was valid "except as to operations in Arkansas." April 7, 1941, the court entered its final decree setting aside the Commission's certificate as to such operations in Arkansas and dismissing the petition in other respects.

Specification of Errors—Cross Appeal

1. The lower court erred in holding that the interest of appellant railroads as competitors of appellee motor carrier clothed them with the right to bring and maintain the suit.

2. The lower court erred in holding that appellee motor carrier had abandoned its "operation as to Arkansas" and in basing its supporting conclusion upon its own weighing of the evidence.

SUMMARY OF ARGUMENT

I. Appellant railroads rest their right to maintain this suit to enjoin the authority granted appellee motor carrier to continue his operations upon the interest of certain of them as competitors and upon the fact that they were interveners in the Commission proceeding. Their interest in being protected from the competition of transportation service, different in kind from the service for which they are soliciting traffic and which appellee has been rendering for shippers since prior to June 1, 1935, is an interest of tenuous substance to clothe them with the right to sue to enjoin the certificate authorizing the continued rendering thereof. And they could not, by merely intervening in the Commission proceeding, vest themselves with such right.

An interest in being protected from competition, amounting of itself to a right to sue to restrain such competition, has to be found in statutory law. Under the Interstate Commerce Act shippers, whose only interest in an order of the Commission is that it relieves their competitors of a rate disadvantage or deprives them of an advantage, are not entitled to maintain independent suits to set aside the order. *Sprout & Son v. United States*,

281 U. S. 249. However, under the "construction and abandonment provisions" (Sec. 1 (18)–(22)) of Part I of the Act, relating to railroads, railroads may be enjoined from undertaking the extension of their lines without Commission authority in suits brought by "any party in interest" (Sec. 1 (20)), which phrase has been held to include competing railroads and other carriers if the proposed extension would bring about a material change in the transportation situation affecting their particular interests. *Western Pacific R. R. v. Southern Pacific Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382. And this special interest entitling such carriers to bring suits to enjoin extensions, if undertaken without the Commission authority, applies to give like permission to bring suits to enjoin a Commission certificate granting such authority on grounds attacking its validity. *Claiborne-Annapolis Ferry Co. Case, supra.*

In the present suit to enjoin the Commission's certificate granting appellee motor carrier authority to continue his operations, the appellant railroads rely, for their standing to maintain it, upon the same provision in section 1 (20) of Part I, contending that it should be read together with section 205 (g) of Part II of the Act, relating to motor carriers, which latter provision reads in part: "Any final order made under this part shall be subject to the same right of relief in court

by any party in interest as is now provided in respect to orders of the Commission under Part I * * *." However, it would appear that this section was not intended by Congress to confer any substantive statutory right, but rather was designed as a procedural measure to govern suits by parties in interest to protect such independent substantive rights as they might possess. Accordingly, the right granted by section 1 (20) should not be held incorporated by analogy into section 205 (g). This view of the nature of section 205 (g) is supported by the fact that the Motor Carrier Act contains a substantive provision (section 222) giving the Commission alone the right to an injunction against wholly unauthorized operations of a motor carrier. By implication, parties in interest such as appellants would be excluded from this right. If, then, they may not enjoin unauthorized motor carrier operations where no certificate of authority has been issued by the Commission, it is altogether unlikely that Congress in enacting section 205 (g) intended thereby to give appellant railroads standing to enjoin the operation of an allegedly void certificate of authority.

Moreover, the difference in type of service being rendered by Fleming as a motor carrier of vehicles from the kind of service performed by appellant railroads is such that the latter should not be considered as competitors having sufficient interest to qualify as "parties in interest" within

the meaning of the statute as interpreted by this Court. The appellants would not, by the enjoining of appellee motor carrier's service of a kind different from that for which they are soliciting traffic, be bettering their competitive situation materially, if at all, if there were other operations of the kind in the field; and if there were none, could not themselves furnish the public with service of the kind that they would shut off. And, aside from the question as to whether appellants' interest in competing transportation service of a kind different from their railroad service supplies standing to maintain suits to enjoin certificates authorizing *proposed* undertakings of such service, there is the further question as to whether such competitive interest could, in any event, supply standing to maintain suits to enjoin certificates giving the sanction required by the "grandfather" clause, not to new, but to existing operations, and which moreover, might frequently have been established in the competitive field and the use of the public for many years prior to the grandfather date. Decisions of this Court sustaining the right of carriers to sue to enjoin *proposed* extension of operation, or to enjoin certificates authorizing such operations, where such new operations would bring about a material change in the transportation situation affecting their particular interests (*Western Pacific R. R.* v. *Southern Pacific Co., supra; Claiborne-Annapolis Ferry Case, supra*) afford no support for appellants' standing to maintain this suit to bring about

a change in the transportation situation, for the purpose of advancing their competitive interests.

I. That the appellants are not clothed with the right to maintain this suit by reason alone of their intervention in the Commission proceeding is settled by decisions of this Court. *Sprunt & Son* v. *United States, supra; Pittsburgh & West Va. Ry.* v. *United States*, 281 U. S. 479, 486.

II. The Commission's certificate authorizing continuance of the operations of appellee motor carrier (hereinafter called Fleming) from Detroit to all points in the States therein named is fully supported by the evidence.

The appellants contend (Br. 22) that the shipments transported by Fleming into the States named prior to the "grandfather" date had been (1) too limited in number to show bona fide engagement in the service to *any* points in certain of the States and (2) that they had been too limited as to destination points to show bona fide engagement in the service to *all* points in any of the States. In developing this contention in their brief the appellants refer to cases in which the Commission denied in whole or in part the applications of general commodity carriers for "grandfather" rights to operate *between* all points in large territories, apparently advancing such cases as controlling the Commission's judgment with respect to the operations in the instant case which, as limited to the transportation of a single product from a single origin point, were inherently characterized by breaks

in service and infrequency of the demands of consignees.

The Commission, in acting upon Fleming's application excluded from its authorization certain States to which Fleming claimed to have been operating because of inadequacy of evidence; and it also excluded operations covered by the application which were of an entirely different character from those authorized. The application was not confined to operations from Detroit to the States named but, as made, covered operations *between* points in the States named, this being in part to enable operations in the transportation of used cars and in part to enable operations in the transportation of newly manufactured automobiles from any origin point furnishing such traffic. The authority, as granted, was limited to the transportation of new automotive vehicles and chassis and to operations from the one origin point, Detroit. As thus limited, Fleming is confined to operations in which the evidence showed he was established with regularity, namely, operations limited to the transportation of a single product from a single origin point, manufacturing the same, to States in which he had done business.

Shipments to most of the States were shown to have been numerous on and prior to the "grandfather" date, although the destination points in no State exceeded seven. In certain of the States Fleming had not commenced operations until 1935, and the shipments to these States prior to the

"grandfather" date were to few destination points and small in amount, although in "fair volume" in view of the nature of Fleming's traffic and his special service. The Commission gave particular consideration to the limited transportation that had been performed in these States, recognizing that it raised a serious question as to whether its scope warranted authorization of operations to all points in the States. In granting the authority, the Commission referred to cases of other special types of motor carriers, such as carriers of household goods and of oil field supplies, serving a large territory over irregular routes, to which it had uniformly granted authority to operate to many points to which actual shipments had not been carried. It referred to the fact that in the case of the general commodity hauler it did not require proof by actual shipments of each and every commodity carried, and it quoted from one of its decisions showing that the consideration governing the question was "whether there has been operation within the 'grandfather' period consistent with the holding out in the natural and normal course of business." In addition the Commission gave special consideration to evidence showing that Fleming's operations were highly specialized, reflecting the marketing characteristics of the product he carried and the intermittent demands of consignees for his particular service in carrying those products. Especially important considerations were the facts that Fleming as a practical

matter was limited to deliveries at points where the automobile manufacturer maintained distribution facilities and that, since such distribution points were shown to be constantly "shifted" and subject to rapid decrease, or increase, in volume of sales, his operations could not be confined to the specific points to which actual shipments had moved.

Section 206 (a), Part II of the Act, pursuant to which Fleming's application was filed, provides that certificates shall be issued "if any such carrier or predecessor in interest was in bona fide operation * * * over the route or routes or within the territory for which application is made * * *." In the instant case Fleming's operations were not operations over regular routes between fixed termini, but were operations entitling him to a certificate for irregular-route operations. The appellants assert that the Commission's construction of section 206 (a) has given that section substantially the same meaning as if the phrase "within the territory for which application is made" had been written "anywhere-for-hire," and they set out certain legislative history, based upon which, they argue that the phrase in question was not intended to authorize such operations but was intended instead to limit applicants operating over irregular routes "to their actual operations, the precise territory they were serving during the 'grandfather' period" (Br. 47). The Government agrees that the statutory grant

of the "grandfather" clause does not extend so far as to entitle a carrier to a certificate authorizing anywhere-for-hire operations on the basis only of the carrier's alleged ability and willingness to perform anywhere-for-hire service. On the other hand, it is the Government's view that the clause does not restrict a carrier with mathematical exactitude to the continued service of only those points in fact visited by the carrier on and since the "grandfather" date. Rather, the Commission is entrusted with reasonable administrative judgment in inquiring into and determining the "territory" within which an applicant operated on and after June 1, 1935. We think that in the instant case the Commission's authorization to Fleming to operate from Detroit to points in a specified group of States differs radically from an authorization to operate anywhere-for-hire; Fleming had in fact made deliveries in all of the States named in the certificate. That the authorization should extend to *all* points in those States appears supported by the record and by the peculiar conditions prevailing in the business of carrying new motor vehicles and chassis.

The appellants' further contention (Br. 41) that the Commission, in authorizing Fleming's operations to all points in the States named in its certificate, construed the word "territory" to mean State, appears to be an effort to change the case from one resting upon facts and judgment to a case con-

trolled only by statutory construction. The Commission did not, of course, construe the word "territory" to mean State. Its action is best described as a using of the boundaries of the States named in the application (1) in determining whether Fleming had been, as alleged in his application, engaged in operating to all points within them, and (2) in defining the areas within which he was authorized to continue such operations. This conformed, of course, with the statute, and the evidence fully supports the Commission's finding that Fleming was in bona fide operation from Detroit, on the one hand, to all points in the State named in the certificate.

As above shown, the Commission was governed by the fact that Fleming's operations, as limited to the transportation of the products of a single industry, reflected the marketing characteristics of the industry in his service. He was, as a practical matter, confined to shipments to the distributing points of the manufacturers which were shown to be constantly shifted and subject to rapid decrease and increase in volume of sales. Fleming's actual shipments, then, were only superficially representative of the substance of his transportation—carrying new motor vehicles from the manufacturer to a distribution center in a distant State, which center would serve as the purchasing market for the surrounding area. A change in point of distribution from one city to another in

the same area would not materially alter the service Fleming rendered in that area. The Commission accorded weight to the carrier's holding out to the public, concerning his service, in delimiting the area of authorized operations; we think this was a reasonable and proper consideration in view of the particular facts of Fleming's type of case.

III. The question as to whether Fleming's operations on and after the "grandfather" date were conducted in good faith is one committed to the Commission for determination and finding. The appellants' allegations, however, that the Commission *erred in holding* that Fleming was in bona fide operation despite "intentional" violation of the laws (or regulations) of two States, in effect, are allegations that it should have construed those laws and acted accordingly.

The record shows that Fleming's operations were carried on for the genuine purpose of serving the public and that in State after State he made inquiries as to the applicable laws, purchased caravan permits and paid taxes and other fees. While the Commission did not attempt to do what appellants urge that it should have done, it gave full consideration to the contentions of appellants (R. 14) and to the whole record. The case is not one of operating without authority in defiance of State laws. Fleming's operations showed a purpose to observe State law and such noncompliance

as there may have been is aptly characterized by the lower court as inadvertent, temporary, or technical. The following statement of the lower court sums up the whole situation (R. 55):

> Fleming's operations were in recognition of state law, and his applications to state authority and his inquiries as to the requirements of the several States were obviously so considered by the Commission. In any event there is no evidence that the inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority.

IV. The lower court's decree setting aside the Commission's certificate as to operation in Arkansas rests upon the statement in its opinion that (R. 33) "The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that State his operations had been abandoned. *United States* v. *Maher*, 307 U. S. 148." Fleming's testimony directly relating to his operations in Arkansas appears to have been limited to a statement as to a special fee paid (R. 86) and a statement with respect to his business in Arkansas at the time of the hearing which is not clear (R. 103); those statements, however, do not exclusively support the lower court's conclusion of abandonment. Nor is that conclusion indisputably established by the fact that Fleming's last shipment was made a little over

a year prior to the hearing, in view of the fact that Fleming's operations were shown to be specially characterized by breaks in service and intermittent demands of consignees.

The action of the court below in weighing the evidence for itself and setting aside the Commission's determination on the question of abandonment was error.

ARGUMENT

I. Appellant railroads are without standing to maintain the suit

The appellants are railroads operating throughout the country and carrying by means of tracks and cars all kinds of freight, including automobiles, to all parts of the United States. The appellee motor carrier's operations are restricted to the transportation of automobiles and chassis by the "driveaway" method earlier described, which differs substantially from appellants' railway service.

The appellants rest their right to maintain the suit on section 205 (g) of the Motor Carrier Act in conjunction with section 1 (20) of the Interstate Commerce Act. The Government, however, takes the position that standing is not so conferred upon them; that they must base their suit on a statutory right of relief since no independent equitable right is available, and that no such statutory right of relief exists; that the fact of appellants' interven-

tion in the proceedings before the Commission does not of itself give them standing to sue.

1. Appellants have no right to secure an injunction aside from statutory grant

Competition is for the most part a force of recognized good and, consequently, an interest in being protected from it amounting to a right to maintain suits, has to be found in statutory law. *Western Pacific R. R. Co.* v *Southern Pac. Co.*, 284 U. S. 47, 51. In suits to set aside orders of the Commission, the question as to whether a competitive interest supplied standing to maintain them first came up in connection with shippers. In *Edward Hines, Trustee*, v. *United States*, 263 U. S. 143, shippers, whose real interest in an order abolishing certain penalty charges exacted for the detention of cars was because it relieved competing shippers from paying the penalty, were held to be without standing to maintain a suit to set aside the order as beyond the Commission's authority. In *Sprunt & Son* v. *United States*, 281 U. S. 249, involving a suit to set aside a Commission order which had, by requiring a readjustment of rates, deprived appellants of a rate advantage previously enjoyed, this Court said at pages 254, 255:

> "The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate

> differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under section 3 of the Interstate Commerce Act, for their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. * * *"

Subsequently, in a suit brought by one railroad to set aside a certificate, issued by the Commission under section 1 (18) to (20) of the Interstate Commerce Act, authorizing another railroad to extend its line of railroad, a lower court dismissed the bill on the ground, *inter alia*, that the plaintiff railroad was without standing to maintain the suit, for the reason that, while it undoubtedly had an interest in preventing intrusion by a competitor into a district it was exclusively serving, that interest alone did not give it a right to sue to set aside the per-

mission given the competitor to do so. (Citing the *Sprunt Case, supra*), *Pennsylvania R. R.* v. *United States et al.*, 40 F. (2d) 921.

Decisions of this Court show that a wrong application was made in the above case of the decisions in the *Hines Case* and *Sprunt Case, supra* (*Chesapeake & Ohio R. R.* v. *United States*, 283 U. S. 35; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382), but this was because of special authority given by the "construction and abondonment" provisions of the Act[2] to "any party in interest" to bring suits to enjoin unauthorized extensions of lines and the direct relation between those suits and suits under the Urgent Deficiencies Act to enjoin the Commission's authorization of any such extension of lines. In the *Claiborne-Annapolis Ferry Case, supra*, question was raised as to the ferry company's standing to maintain a suit to set aside a certificate issued by the Commission authorizing the Chesapeake Beach

[2] Sec. 1 (18)-(22), Interstate Commerce Act, Part I. These provisions were added to the Act by Transportation Act, 1920, 41 Stat. 456, 477, 478. Cf. *Texas & Pac. Ry.* v. *Gulf, Colo. & S. F. Ry.*, 270 U. S. 266. Paragraph (18) forbids the extension, etc., of a line of railroad without a Commission certificate of public convenience and necessity. Paragraph (19) prescribes the manner of application to the Commission for an issuance of certificate. Paragraph (20) provides, among other things, that any construction without a certificate pursuant to paragraph (18) may be enjoined at the suit of the United States, the Commission, any Commission or regulating body of the State or States affected, or "any party in interest."

Railway to extend its line of railroad by ferry service from Chesapeake Beach across the Bay to a point in Dorchester County, Maryland. The Ferry Company operated a ferry over a route about 20 miles north. The local business, or general ferry business, that the railroad ferry might absorb seems to have been its chief concern. The decision, after stating that the bill disclosed that the proposed and permitted action might directly and adversely affect the ferry company's welfare by changing the transportation situation, states at pages 391, 392:

> "The right of appellant Ferry Company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, section 1. 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In the absence of such certificate the doing of any of these things is declared to be unlawful—a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence to support its findings or other reason. An invalid certificate would leave the situation as though

none had issued. *Chicago, R. I. & P. Ry. v. United States*, 274 U. S. 29."

2. Appellants had no statutory right as alleged

It will be seen that the above emphasizes that the standing of the Ferry Company to maintain the suit to enjoin the Commission's certificate authorizing the extension of line rested wholly upon the permission granted to "any party in interest" by section 1 (20), Part I of the Act, to enjoin any such extension where undertaken by a railroad without authority. In the instant suit to enjoin the Commission's authorization of appellee's motor carrier operations, the appellants rely, for their standing to maintain it, upon the same provisions in section 1 (20) of Part I, contending that they should be read together with section 205 (g) of the Motor Carrier Act, Part II of the Interstate Commerce Act, which latter provisions read in part:

> "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I * * *."

It is the view of appellees that to interpret section 205 (g) as incorporating by reference substantive rights analogous to those conferred by section 1 (20) would be erroneous. Rather, section 205 (g) should be regarded as a procedural provision giving to parties in interest who possess independent substantive rights the same form of

judicial remedy which is granted to them in Part I of the Act in certain situations. The Motor Carrier Act, in section 222, contains substantive injunction provisions analogous to those of section 1 (20). Section 222 (b), Part II of the Act provides in part:

> "If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof) * * * or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to a United States District Court 'for the enforcement of such provision * * * and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise * * *'."

The Commission, then, may sue to enjoin unauthorized operations by a motor carrier, where no certificate of authority has been issued by it; however, the omission of the statute to mention "parties in interest" as similarly entitled leads to the conclusion that they have no standing to secure an injunction against a carrier which is operating in excess of or without a certificate of public convenience and necessity issued under either section 206 or section 207. It is plain that section 205 (g) could confer upon them no such right, because that section applies only to review of a final order of the

Commission. It would be entirely anomalous under those circumstances if section 205 (g) were held, nevertheless, to give "parties in interest" the right to enjoin operation pursuant to a certificate on the ground that the authorization is invalid. A proper interpretation of section 205 (g) requires, therefore, that a party in interest base his suit for injunction on a substantive right independent of section 205 (g). As pointed out earlier, where the interest is only that of freedom from competition not authorized by the applicable regulatory statute, the right to relief by a complainant must be founded on statute.

Moreover, narrowing consideration down to the substance of appellants' interest in having the Commission's authorization of appellee's "drive-away" operations enjoined: it is, as above stated, an interest in being protected from the competition of transportation service, different in kind from the service for which they are soliciting traffic,[1] and which appellee has been engaged in, and rendering for shippers, since prior to June 1, 1935. Such an interest is plainly not the same thing as the competitive interest which appellants have in preventing the extension of operations by other railroads into fields which they are already supplying with

[1] In the *Chihuahua-Annapolis Ferry Case*, *supra*, the ferry company's concern was because of the local, or general ferry, business that the railroad's ferry might absorb. So far as this business was concerned, the ferry company and the ferry "extension" would be carriers of the same kind.

transportation service of railroad kind. It is settled that this latter interest gives appellant railroads standing to sue to enjoin the undertaking of unauthorized extensions of operations by rival railroads, or, if authorized, to sue to set aside the authorization; but it does not follow from this that they have like standing to maintain a suit, such as this, to enjoin transportation service of different kind than that for which they are soliciting traffic. In the instant case of appellee's "driveaway operations" and in other cases of operations distinctly different from the railroad service appellants are able to offer to shippers, appellants would not, by the enjoining of such operations, be bettering their competitive position materially, if there were other operations of the kind in the field; and, if there were none, could not themselves furnish the public with service of the kind that they would shut off.

Furthermore, aside from the question as to whether appellants' competitive interest in transportation service of a different kind than the railroad service for which they are soliciting traffic, would supply standing to maintain suits to enjoin certificates authorizing *proposed* undertakings of such service, there is the question as to whether such competitive interest could, in any event, supply standing to maintain suits to enjoin certificates giving the sanction required by the "grandfather" clause, not to new, but to existing operations, and which, moreover, might frequently have been established in the competitive field and use by the public

for many years prior even to the "grandfather" date. In the "construction and abandonment" paragraphs of Part I there is no provision corresponding to the "grandfather" clause. Since the railroads were subject to regulation when the said paragraphs were enacted, they were not required to obtain Commission authority for their existing operations and there was, therefore, no occasion for a "grandfather" proviso. The prohibition running against the railroads is that they shall not undertake the extension of their lines, or operations, unless and until they shall have first obtained the Commission's authority. Accordingly, the certificates issued under Part I grant authority for *proposed* extensions of lines, or operations, and suits by the railroads to set aside such authority have the purpose of preventing new undertakings "threatening" invasion of their fields and not of enjoining operations over existing lines competing with their own.

As above shown, section 206 (a) of Part II not only requires the Commission's authority for new motor carrier operations but also for operations which were established prior to the Motor Carrier Act, such authority in the latter case, however, being given upon showing simply that the operations were so established and since continuously engaged in and without requirement of further proof of "public convenience and necessity." The Act thus gives recognition to the rights of carriers in established and existing operations and only

requires proof of those rights for its authority to continue the operations. There is a fundamental difference between a Commission certificate evidencing such rights and one authorizing new operations and newly found to be required by public convenience and necessity, and particularly is this so in any consideration of the standing of other carriers to sue, simply as competitors, to set aside the certificate by attacking such rights.

The standing of appellant railroads to maintain this suit finds no support in the decisions of this Court sustaining the right of the railroads to sue to set aside certificates authorizing proposed competitive extensions of lines, or to sue to enjoin unauthorized construction of competing lines newly undertaken. Even in such suits, a competitive interest supplies standing only as the railroads are able to show that the proposed, or new, extension of lines, or operations, will bring about a material change in the transportation situation directly affecting their particular interests. *Western Pacific R. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; *Singer & Sons* v. *Union Pacific R. R. Co.*, 311 U. S. 295. In the instant suit to set aside the Commission's certificate authorizing the continuance of operations under "grandfather" right, the appellants are not suing to prevent a change in the transportation situation but to enjoin an allegedly erroneous determination of what the motor carrier transportation situation was on and after June 1, 1935.

3. Appellants' intervention in the Commission proceeding did not carry with it the right to maintain the suit

Appellants asserted in the lower court that they had standing to maintain the suit on either the ground of their competitive interest or the ground of their intervention in the Commission proceeding. The appellants themselves illustrate the results to which this position would lead for the reason that, while they are interveners, most of them are railroads whose location is such (R. 2, 4) that they could not have a competitive interest in appellee's motor carrier operations; their interest, therefore, consists simply of a desire to obtain the court's opinion as to the validity of the Commission's order.

Appellants refer to the fact that by virtue of a provision in Part II all the provisions of section 17 of Part I are made to apply to motor carrier proceedings including subdivision (9) of said section 17 of Part I (49 U. S. C., sec. 17 (9)) which provides:

> "(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration, otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or

> requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

The above provision was added to section 17 of Part I by Transportation Act, 1940 (54 Stat. 916) which was not enacted until after the Commission proceeding and instituting of the suit in the court below (R. 3), but it is, in any event, patent that the provision does not, and is not intended to, extend standing to bring suits to parties, in addition to those who had such standing prior to its enactment. The substance of the provision is to the effect that, after the applications for rehearing, or reconsideration, are disposed of by the Commission, suits may be brought "*under* those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise." This, it is plain, makes no change in the existing statutes for review of Commission orders. The purpose is to require parties to obtain final administrative action before resorting to the courts and not to give standing to bring such suits to parties not otherwise having such standing.

For their position that their intervention in the Commission proceeding, in and of itself, gives them standing to maintain the suit, appellants also rely on the *Chicago Junction Case*, 264 U. S. 258, and a lower court case *(Consolidated Freightways, Inc.*

v. *United States*, 34 F. Supp. 576) which sustained the right of a motor carrier to sue to set aside a certificate authorizing the proposed operations of another such carrier. The Commission's order involved in the *Chicago Junction Case*, *supra*, was one entered primarily (p. 262) under section 5 (2)[4] of the Act and authorized the New York Central to acquire control of the Chicago Junction Railway, a terminal railroad over whose tracks the railroads, plaintiffs in the suit, as well as the Central, gained access to the Chicago stockyards. In determining the question of the plaintiffs' standing to maintain the suit, the decision gives consideration not only to the fact of their intervention in the Commission proceeding, but also to the facts that the order substituted the control of the one railroad for the former neutral control and was shown to have already worked heavy irreparable damage to the plaintiffs and was continuing to subject them to like loss. "This loss," the decision states, "is not the incident of more effective competition * * *. It is injury inflicted by denying the plaintiffs equality of treatment * * *." (Pp. 266, 267.)

In the later *Sprout Case*, *supra* (281 U. S. 249), in which it was held that the plaintiffs did not have standing to maintain a suit to set aside an order which deprived them of a competitive advan-

[4] Section 5 (2) (41 Stat. 456, 481) included provisions not contained in section 5 (2), as amended (54 Stat. 905) in which it is now embodied.

tage, the Court said of their competitive interest (p. 255):

> "* * * Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. * * *."

In other decisions following the above case it has been similarly held that the fact that a party was permitted to intervene before the Commission did not, of itself, give it standing to maintain a suit under the Urgent Deficiencies Act. *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U. S. 479, 486; *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119. In the *Claiborne-Annapolis Ferry Case*, *supra*, the fact of the ferry company's active intervention in the Commission proceeding is shown not to have been, of itself, enough to supply it with standing to maintain the suit, the Court's holding being, as above stated, that the right of

the ferry company to bring and maintain the suit "rests wholly upon the permission granted by paragraph 20, section I."

II. The Commission's order authorizing the appellee motor carrier's operations from Detroit to any points in the States therein named and the incidental return operations is supported by the evidence

Appellant railroads' first ground for their charge of invalidity against the Commission's order is that its authorization of the operations of appellee motor carrier (hereinafter called Fleming) from Detroit to any points in the States therein named is not supported by the evidence. The appellants do not apparently contend that Fleming had not transported shipments into the States named prior to the "grandfather" date; their contention appears to be that the shipments transported by Fleming before and after that date were (1) too limited in number to show bona fide engagement in the service to *any* points in certain of the States and (2) that they were too limited as to destination points to show bona fide engagement in the service to *all* points in any of the States. (Br. 22.) In developing this contention, or argument, in their brief, the appellants give little, if any, consideration to the special characteristics of Fleming's service as contrasted with carrier service for which there is more general and steady demand.

As shown by the Commission's report and evidence (R. 11, 92–96, 109–118) Fleming had commenced operations early in the year 1933, from which time to July 1936 he had transported or participated in transporting more than 2,100 vehicles, the shipments consisting of from 1 to 16 vehicles, although shipments of 2 to 4 vehicles exceeded shipments of other quantities. The number of points served prior to the "grandfather" date varied from one point in each of the States of Arkansas and Alabama to seven points in Georgia. Numerous shipments were transported to the points served prior to the "grandfather" date except for points in States in which operations were not started until 1935. As to these, the Commission report states "It appears, however, that by June 1, 1935 (the "grandfather" date) a fair volume of traffic had been moved. The three shipments to Arkansas aggregated 25 vehicles; four shipments to Texas aggregated 14 vehicles; four shipments to Oregon aggregated 24 vehicles; and five shipments to Washington aggregated 28 vehicles." (R. 13.) During the year between the "grandfather" date and the date of the hearing, July 23, 1936, Fleming's continued operations to the latter States[5] was evidenced by shipments to each of them except Arkansas (R. 92, 110). Shipments to Texas increased in number (R. 95, 117). Shipments to the other

[5] California, R. 93, 102; Oregon, R. 94, 114; [illegible]01; Washton, R. 96, 118; Texas, R. 95, 117.

States named in the Commission's certificate continued with some variation upward or downward.

The Commission, in acting upon Fleming's application, excluded from its authorization certain States to which Fleming claimed to have operated on the ground that the evidence was inadequate to support the claim and it also excluded operations covered by the application which were of an entirely different character from those authorized. The application was not confined to operations from Detroit to points in the States named, but, as made, covered operations *between* points in the States named; and it appears that this was in part for the purpose of obtaining authority to continue operations which Fleming had been conducting in transporting used cars between various points in the States named in his application (R. 11, 12). The Commission excluded "transportation of this character" from its authorization because the evidence did not "warrant the conclusion that it was other than sporadic or that applicant was regularly engaged therein." It limited the authority granted to transportation of new automotive vehicles and chassis and to operations from the one point, Detroit, where the traffic originated.

These operations of Fleming had to be considered from the standpoint that he was established in rendering the service from the origin point, Detroit, and that his operations would naturally take on characteristics conforming to the particular needs

of the industry whose products he moved.[6] The fact that, as to the points noted and other points, the shipments carried by him were few and separated, or varying in frequency, could not be taken as establishing that Fleming was no longer bona fide engaged in transportation to those points, if that was not the reasonable conclusion to be drawn therefrom, in view of the marketing characteristics of the industry and the fact that his service was not one for which there was steady demand. The fact, too, that Fleming's operations, as evidenced by shipments transported prior to the "grandfather" date, were shown to have been conducted to certain points in a State only, could not be taken to establish that the operations he was bona fide engaged in were confined to those points, if such a conclusion would be in conflict with the real character of his operations made necessary by the marketing characteristics of the industry whose products he moved.

Referring to the fact that the evidence of shipments to certain States showed few shipments and few points served, the Commission said in its report (R. 13, 14):

> "It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all

[6] The particular marketing characteristics of the industry as reflected in Fleming's service are shown at several points in the record (R. 50, 51, 54, 76, 84, 108).

of the States served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specific points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which the automobile manufacturers have established distribution facilities; a manufacturer could not, for many reasons, appoint an indefinite number of dealers or distributors for a given territory.

* * * * *

"As basis for authority to serve all points in a State, applicant points out that distribution points are constantly shifted from the standpoint of a State-wide area, dealers' accounts are changed, and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206 (a) of the Act, the provisions of which require in substance

that the authority granted shall permit a carrier to conduct the bona fide operations it was conducting on June 1, 1935. In *Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594, we said that:

'In the case of a common carrier of household goods or of oil-field supplies, serving a large territory over irregular routes, we grant certificates under the "grandfather" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "grandfather" certificates to haul general commodities that each and every commodity within that description has actually been hauled. The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business.'

* * * * *

* * * Applicant's service, according to our view, was necessarily confined to deliveries at a very few points, and future opportunities of obtaining traffic, no doubt, will be likewise limited. This is true, even though applicant has at all times held his services out to the public generally."

In the succeeding paragraph, the Commission, in discussing the question as to whether Fleming was a common, or contract, carrier (not in issue here), stated that the evidence indicated that the business performed was obtained by solicitation of dealers and distributors engaged in marketing the vehicles;

that Fleming would transport for anyone requesting him to do so; and that he held himself out to transport between any points in the States for which the application was made (R. 14). Later in the report the Commission said (R. 15, 16):

> "Protestants' principal arguments are directed to questions of whether applicant may serve all the points in the States for which application is made; whether, in view of infrequent service to various points in the States claimed, certain rights were not thereby abandoned; and whether applicant should or should not be limited to the particular routes from Detroit to key points in the territory actually served, deliveries thereafter to be made over irregular routes. In deciding these questions, it is also necessary to take into consideration the type of operation, frequency of the demand of the consignees for which the carrier performs transportation services, and the nature of the industry served. The record is convincing that the applicant's operations have been, and will continue to be, irregular in nature because of conditions under which he may secure traffic. The same proof with respect to territory served that might be required of a general commodity hauler, therefore, cannot be imposed, nor can operations be confined within the same definite limits. Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington,

> such restrictions apparently would not be in accordance with the operations performed on the statutory date. The fixing of specific termini would also prevent his rendering the type of service he has been performing."

The statements and findings of the Commission contained in the above quotations from the report supply an entirely sound basis in fact and reason for its conclusion that Fleming was entitled to a certificate authorizing irregular route operations to all points in the States named in the certificate issued to him.

Section 206 (a) of the Motor Carrier Act, pursuant to which Fleming's application was filed, provides that certificates shall be issued "if any such carrier or predecessor in interest was in bona fide operation * * * over the route or routes or within the territory for which application is made * * *." Section 208 (a) of the Act provides that "any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which the fixed termini, if any, between which and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate * * *."

In the instant case Fleming's operations were not regular-route operations between fixed termini but were operations entitling him to a certificate for irregular-route operations, that is, operations

not restricted either to regular routes or to fixed destination points. The Commission had found, as above shown, that, because of the conditions under which Fleming had to obtain traffic, his operations had been, and would continue to be, irregular in nature; that he could not be restricted to fixed routes without handicapping his business; and that the fixing of specific termini would prevent his rendering the type of service he had been performing. Based upon these findings and the findings and reasons earlier given in its report, the Commission made its concluding finding that Fleming had been engaged on June 1, 1935, and since that time "in bona fide operation as a common carrier * * * of new automotive vehicles * * * from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas * * * and Washington, on the other hand, over irregular routes through the States of Idaho, Illinois * * * and Wyoming; and that he is entitled to a certificate of public convenience and necessity authorizing the continuance of this operation" (R. 16, 17).

The appellants assert (Br. 42–47) that "the Commission's construction of section 206 (a) has given that section substantially the same meaning as if the phrase "within the territory for which application is made" had been written "anywhere-for-hire," and they set out certain legislative history, based upon which, they argue that the phrase in question was not intended to authorize such

operations.[7] Since they reach the conclusion that it was intended "instead to limit applicants not operating over regular routes nor between fixed termini to their actual operations, the precise territory they were serving during the 'grandfather' period * * *" (Br. 47), it is apparent that the misconstruction of the statute with which the appellants charge the Commission was its failure to limit the operations which it authorized Fleming to continue to operations touching the precise points in fact served by him. While agreeing that the statutory term "territory" does not comprise the scope of anywhere-for-hire transportation, we do not think that the "grandfather" clause can properly be interpreted as freezing a carrier's operations fast to the precise trips in fact made by him prior to the administrative hearing before the Commission; such a result is in conflict with even the literal language of the clause: that refers to operation on and since June 1, 1935, and there is every probability that no carrier will have made after the "grandfather" date the identical trips made approximately at that date. It is only possible to conclude that the Congress has conferred on the Commission some latitude of judgment to determine whether on particular facts a carrier's application falls within the statute's provisions;

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[7] The appellants do not define the anywhere-for-hire operations to which they refer. Compare *United States v. Maher*, 307 U. S. 148.

under such circumstances the Commission's determination of the extent of Fleming's bona fide operation ought not to be disturbed if warranted in the record. See Brief for the Petitioners, *Gray* v. *Powell*, No. 18, this Term, pp. 11–13, 15–25. A review of the evidence in the present case discloses ample support for the Commission's findings. It is clear that the Commission has not authorized anywhere-for-hire operations by Fleming, but has restricted him to a continuation of the service he has been substantially performing in the named States.

The appellants' further contention (Br. 41, 42) that the Commission, in authorizing Fleming's operations to all points in the States named in its certificate, construed the word "territory" to mean State, seems also an effort to change the case from one resting upon facts and judgment to a case controlled by statutory construction. The Commission did not, of course, construe the word "territory" to mean State. Its action is best described as a using of the boundaries of States named in the application (1) in determining whether Fleming had been, as alleged in his application, bona fide engaged in operating to all points within them, and (2) in defining the areas within which he was authorized to continue such operations. This conformed, of course, with the statute, and the evidence and findings fully supported the certificate issued to Fleming authorizing continuance of

his operations as a common carrier of new automotive vehicles and chassis "from Detroit, Mich., on the one hand, to all points in Alabama, Arkansas * * *, on the other hand, over irregular routes * * *." As above mentioned, such certificate effected a denial in part of Fleming's application by limiting the authority granted to the transportation of *new* automotive vehicles and to operations from the single origin point, Detroit, which supplied the traffic (R. 9, 11). The operations authorized, therefore, were strictly of a kind that were wholly dependent for traffic upon one industry, reflecting that fact in the few points to which shipments had been carried and their intermittent character, and necessitating consideration of the special character of Fleming's operations as essentially operations that had to be responsive to the marketing characteristics of the industry.

The circumstances in the latter connection which the Commission particularly emphasizes are that Fleming was, as a practical matter, "limited to shipments to points at which the automobile manufacturers" maintained distribution facilities (R. 13), and that, since such distribution points were constantly "shifted" and subject to rapid decrease, or increase, in volume of sales, his operations could not be confined to the specific points to which shipments had in fact moved. (R. 14.) This situation, the Commission said in its report, made manifest that it must take into consideration

the character of a transportation service when issuing a certificate under section 206 (a) of the Act; and it thereafter quoted from one of its decisions (*Reliance Trucking Co. Contract Carrier Application*, 4 M. C. C. 594) showing that in cases of common carriers of household goods or of oil field supplies, serving large territories over irregular routes, it granted "certificates under the 'grandfather' clause permitting operations to many points to which no freight had actually been carried," and further showing that the consideration which it regarded as governing was "whether there has been operation during the 'grandfather' period consistent with the holding out in the natural and normal course of business." Giving effect to this consideration, or principle, as laid down, it will be seen that the holding out in natural and normal course of business coupled with operation consistent in the circumstances with the holding out is the criterion. Judged by the application of the principle in the cases of carriers of household goods or of oil field supplies, such carriers' holding out covered "many points to which no freight had actually been carried." Their holding out to serve those points, however, was one entirely in the natural and normal course of business in view of the special characteristics of their transportation services.

The Commission's report points to its action, authorizing operation by carriers of such kind to all points in a large territory, as precedent for its action upon Fleming's application (R. 13, 14). It

was of the view that Fleming's "deliveries" would continue to be made to a very few points although, as stated by it "applicant has at all times held his services out to the public generally" [*] (R. 14). In its discussion in the succeeding paragraph of the question as to whether Fleming was a common, or contract, carrier, the Commission emphasizes the general character of this "holding out" by its statement that Fleming "would transport for anyone requesting him to do so; that he held himself out to transport by driveaway method between any points in the States for which application is made * * *" (R. 14).

As above mentioned, the application made by Fleming was for authorization of operations within State boundaries, that is, for authorization of operations to all points in the States named in the application. Even aside from the characteristics of Fleming's service, the situation he was in in offering it to the public, arising from the fact that it was a service limited to the transportation of the products of a single industry (R. 14), supplied strong ground for giving full effect to his testimony that he was holding that service out to all points

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[*] In *Kenosha Auto Transport Corp. Common Carrier Application*, 24 M. C. C. 753, 757 (Driveaway) it was said:

"Applicant's service was necessarily confined, because of the type of commodities transported, to a very few points compared to the large territory sought, and future operations will be likewise limited. Moreover, applicant has always held itself out to serve any and all points in the States claimed."

in the States." With Fleming established in the rendering of his service of transporting new automobiles at Detroit, the point originating the traffic, his holding out of that service, limited to the transportation of one product from the one origin point, to States in which he had done business is a holding out of substance and weight. Coupling this with the characteristics of Fleming's service which showed that those points alone to which actual shipments were made were not truly representative of the points embraced in his real business and operations, it is apparent that Fleming's holding out to points not in fact served had to be given great weight and that it, together with actual services performed, fully supported the Commission's findings that Fleming was bona fide engaged in operation to all points in the States named in the Commission's certificate.

The appellants (Br. 32, 38), attempting apparently to show that the Commission was inconsistent in granting Fleming's application for "grand-

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"In *Eucalyptus Wood Co., Common Carrier Application*, 16 M. C. C. 468, 472, it was said:

"For these reasons and because of the specialized nature of the service, we have consistently held that not only the services actually performed during the 'grandfather' period but also the holding out to serve any point within the territorial scope of the applicants' operations must be considered. See *Greer Common Carrier Application*, 3 M. C. C. 483; *Union City Transfer Common Carrier Application*, 7 M. C. C. 717; *J. Norman Geipe, Inc., Common Carrier Application*, 1 M. C. C. 693; *L. C. Jones Trucking Co. Common Carrier Application*, 9 M. C. C. 740; *Miller Common Carrier Application*, 10 M. C. C. 15."

father" rights in this case, refer to a number of cases in which it denied to general commodity carriers an authorization comparable to that given Fleming, where the showing of actual shipments was essentially similar to that in this case. The Commission's report on Fleming's application sets out (R. 14) the consideration[10] which it regards as governing the disposition to be made in cases of special type carriers as contrasted with carriers of general commodities; those considerations have been emphasized in this brief. We think that they afford a sufficient basis for the distinction in treatment long made by the Commission, with respect to the importance of holding out, in passing on the claims of the general commodity and special type carriers.[11]

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[10] See *Eucalyptus Wood Co. Common Carrier Application*, 16 M. C. C. 468, 473.

[11] In *United States* v. *Carolina Freight Carriers Association*, No. 197, this Term, a carrier applied for "grandfather" authority to transport general commodities between any points in a number of eastern seaboard States. The Commission found that the carrier had been engaged in transporting only a small number of specific commodities, and, despite allegations of the carrier's holding out with respect to territory, limited the authorization of the certificate geographically to operations between points and areas in fact substantially served on and after the "grandfather" date. The Commission did not there accord to the applicant's representations the weight which it has given to Fleming's holding out in the present case. While the Carolina Corporation was found not to be a general commodity carrier, its type of business nevertheless differs greatly from that of Fleming, with the result that the Commission's different treatment of the two cases in regard to holding out seems thoroughly justified.

III. The Commission's determination that Fleming's operations were conducted in good faith was within its statutory authority and was fully supported by the record

1. The question as to whether operations on and after the "grandfather" date have been conducted in good faith is one committed to the Commission for determination and finding

The appellants advance as further ground for the setting aside of the Commission's certificate that it erred in holding Fleming to be in *bona fide* operation in certain territory despite his noncompliance with certain regulatory and licensing laws (Br. 35). The record shows that Fleming's operations were carried on for the genuine purpose of serving the public and that in State after State he made inquiries as to the applicable laws and requirements, purchased "caravan" permits and paid taxes and other fees (R. 85, 86). As said by the lower court "Fleming's operations were in recognition of state law and his inquiries as to the requirements of the several States were obviously so considered by the Commission" (R. 35). However, the appellants term the noncompliance of Fleming to which they refer "intentional violation of law," and their allegation that the Commission *erred in holding* Fleming to be in bona fide operation despite such violation of law is in effect an allegation that the Commission should have held that the laws in question had been intentionally violated by Fleming and have denied his application on that ground.

The Act places with the Commission the duty of finding whether or not an applicant for a "grandfather" certificate was "in *bona fide* operation * * * on June 1, 1935, * * * and has so operated since that time * * *" (Sec. 206 (a).) In *United States et al. v. Maher*, 307 U. S. 148, the Court said (pp. 153–154):

> "* * * But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes * * within the territory for which application was made and has so operated since that time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission. The legal issues presented by this record are relatively simple once the somewhat confused operations of the appellee's business are clearly defined."

The above statement of this Court brings out the fact that, in "grandfather" cases the finding that

a carrier was engaged in bona fide operation takes the place of the usual public convenience and necessity finding. But, to the extent that the finding is discussed, its administrative character is fully recognized. All of the Commission's fact finding and judgment on the facts and circumstances in situations before it would seem to be embodied in this ultimate finding of bona fide operations. The extent to which it expects that the Commission shall give consideration to *facts* showing that an applicant's operations have been carried on in nonrecognition of State laws is one thing, but the consideration of State laws requiring legal determinations, such as appellants in effect assert is the Commission's duty, or action upon such laws that would be beyond the administrative field, is an entirely different thing. The Commission's legal determinations even of the laws administered by it are not final. They may lead up to, or be incidental to, such finding of bona fide operation but they cannot be embodied in the finding itself, the making of which is committed to the Commission. The Commission makes many legal, or quasi judicial, determinations but it would seem that except for its determination of reparation, any legal determinations go to its authority to take action in any case and, therefore, would not be committed to it as determinations entering into the findings upon which the action rests in its character of administrative action. This is best illustrated by this

Court's decision in *Texas & Pac. Ry.* v. *G., C. & Santa Fe Ry.*, 270 U. S. 266, which involved a suit brought by the Texas & Pacific under section 1 (20) of the Interstate Commerce Act to enjoin the Santa Fe from constructing a short extension of its lines into the industrial section of Dallas, Texas, without having first obtained the Commission's authority pursuant to section 1 (18). The District Court granted the injunction, its decree was reversed by order of the Circuit Court of Appeals and the appeal to this Court was taken from that order. The Santa Fe had made objection to the District Court's jurisdiction and renewed the objection on the appeal. Its answer to the bill asserted that its proposed line was merely industrial track excepted by section 1 (22) from the extensions for which the Commission's authority was required (Pp. 270, 271). This defense raised the question whether the projected line constituted an extension within the meaning of section 1 (18); and the Santa Fe contended that it was one which Congress had by implication committed to the prior determination of the Commission along with the authority conferred upon it to determine whether an extension was compatible with the public interest, and that, since the Texas & Pacific had not obtained a determination by the Commission that the projected track constituted an extension, the District Court was without

jurisdiction over the suit. Speaking of this argument, the decision reads (p. 272):

> "To this argument the provisions of the Act afford a complete answer. Paragraph 18 prohibits the construction of an extension without obtaining the certificate. Paragraphs 19 and 20 provide that a carrier desiring to construct one may apply for the certificate and provide the method of proceeding. Whenever such an application is made the Commission may pass *incidentally* upon the question whether what is called an extension is in fact such; for if it proves to be only an industrial track, the Commission must decline on that ground to issue a certificate. * * *
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> * * * The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. * * *"

The finding of bona fide operation is not quasi legislative but this, of course, does not remove it from the field of administrative judgment on facts.

Piedmont & Northern Ry. v. *United States*, 286 U. S. 469, and *United States* v. *Idaho*, 298 U. S. 105, involved cases in which the Commission passed incidentally upon like questions under section 1 (18)–(22) as necessary to determine its authority

to proceed with its administrative action and findings. In the latter case its authorization of the abandonment of certain track found to be in the public interest was set aside on the ground, distinct from its administrative finding, that it had been wrong in holding that the track constituted an extension.

Of course, the *Texas & Pacific Case*, *supra*, indicates quite plainly that the particular reason why questions as to the character of trackage, or operations, arising under section 1 (18)–(22) are legal questions for the court is because they are made so by the statute. Such questions, of themselves, are particularly suited for determination by the Commission. In fact the determination of questions of just such kind, even as establishing the jurisdiction of another tribunal, may be properly committed to the Commission. *Shields* v. *Utah-Idaho Cent. R. R.*, 305 U. S. 177. And, as for questions of such kind being determinative of the Commission's own jurisdiction, it may be said that there are a good many questions as to the character of trackage, or operations, which are essentially administrative determinations and, as such, quite commonly enter into its ultimate jurisdictional findings upon which its administrative action rests.[12]

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[12] These determinations, however, are more inherently matter of administrative judgment because they are only guided by the very general definition of "transportation" and "railroad" contained in section 1 (3) of the Act, coupled with

However, questions as to the character of trackage under section 1 (18)–(22) are, as held by the Court, questions which are shown to be legal by those paragraphs, and, as such, the Commission's determination could not be embodied in the ultimate administrative finding. However and whenever made they would be legal determination subject, as such, to complete review by the Courts. *United States* v. *Idaho, supra.* The application of this to appellants' contention that the Commission erred in not holding that Fleming intentionally violated the laws of Oregon and Nebraska, and, therefore, erred in holding that he was in bona fide operation, is that the Commission has no judicial powers even with respect to the statutes which it administers, and plainly has none with respect to the laws of the States. Even if such a determination could be said to be quasi-judicial and incidental to the Commission's ultimate finding of bona

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particular provisions of the Act to be applied. Nevertheless, there is no reason why the determination of questions as to the character of the trackage, or operations, exempted by section 1 (22) from the requirement to obtain authority for new construction, or extensions, could not have been committed to the Commission, if Congress had so desired. And, if that had been done, any such determinations would have been embodied in its ultimate administrative finding of public convenience and necessity. There would be a statutory standard of exemption applied, but one so very broad and general (*Piedmont & Northern R. R.* v. *Int. Com. Comm.* 286 U. S. 299) that it could be committed to the Commission without trenching upon the field of legal interpretation.

fide operation, problems as to court review are apparent.

The appellants rely upon this Court's decision in *McDonald* v. *Thompson,* 305 U. S. 263, but there is nothing in the action taken in that case, or that was said in the opinion, that supports their views. The case was one of alleged supersedure of the State statute, brought to the Court in the usual way. The instant case is one for the review of a Commission certificate and it is not a case of operating without authority in defiance of State laws. The lower court, speaking of this Court's decision in *McDonald* v. *Thompson,* said (R. 34) that it—

> "* * * holds that the expression 'in bona fide operation' suggests 'absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service, and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire'. It then reaches the conclusion that, 'plainly the proviso does not extend to one operating as a common carrier on the public highways of the state in defiance of its laws'."

Later the lower court, after discussing the decision in its application to this case, said (R. 55):

> "* * * Fleming's operations were in recognition of State law, and his applications to State authority and his inquiries as to the requirements of the several States

were obviously so considered by the Commission. In any event there is no evidence that his inquiries were not pursued in good faith or that he had been excluded from any State by local administrative authority."

2. The Commission's findings establish Fleming to have been in bona fide operation

The facts relating to Fleming's operations included in the Commission's record—his growing business, his satisfactory returns, his safety record, his large tax and license fee payments, his freedom from prosecution for violation of State regulatory laws—taken together, clearly support the Commission's finding that Fleming was in bona fide operation. Its underlying finding reads (R. 14):

> "Protesting rail carriers contend that applicant's operations were not bona fide in character, because he failed to procure certificates from the States through or into which he conducted operations. Applicant, however, made inquiry as to certificate requirements of the States and he testified that, to the best of his information, certificates were not required, with one or two exceptions. Receipts for taxes paid in Nebraska, Wyoming, Idaho, Utah, Kansas, and Arkansas were introduced and applicant holds certain permits issued by the States of Oregon and Nebraska."

The lower court's statement (R. 35) that Fleming's operations were in recognition of law and that

there was nothing to show that his inquiries were not pursued in good faith or that he had been excluded from any State by local administrative authority accurately reflects the record.

IV. The District Court erred in setting aside the Commission's order with respect to operations in Arkansas

The District Court in holding that the Commission improperly authorized Fleming to operate from Detroit to all points in the State of Arkansas gave as its reason in modifying the certificate accordingly:

> The record discloses that Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that state his operations had been abandoned. *U. S.* v. *Maher,* 307 U. S. 148. (R. 33.)

Arkansas was one of four States in which Fleming did not commence operations until 1935. Concerning those operations the Commission stated in its report (R. 13):

> It appears, however, that by June 1, 1935, a fair volume of traffic had moved.

The Commission's finding that Fleming had been in bona fide operation to points in Arkansas on June 1, 1935, is fully sustained by the evidence contained in exhibits filed by Fleming with the Commission (R. 92, 110); during the months of March, April, and May, 1935, Fleming moved [illegible]

vehicles to Texarkana, Ark. The issue here between appellants and appellees is whether Fleming's operations into Arkansas were subsequently abandoned.[13] Fleming's direct testimony on this aspect of the case, referred to by the District Court in its opinion (R. 33) is not clear. He said at the hearing (July 23, 1936):

> In Arkansas we have one place in Texarkana but we do not serve any other dealers in the state and were not in 1935. (R. 103.)

On the basis of this evidence and the exhibits showing Fleming's operations the Commission found that he had not abandoned service to Arkansas points after June 1, 1935. Since the finding involved the weighing of testimony in conjunction with a consideration of shipping bills and the nature of the business conducted, we think the Commission's determination should not have been disturbed by the District Court, the record disclosing support for the Commission's interpretation as much as for that of the court below.

The fact that Fleming transported no shipment to Arkansas for the period of little over a year

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[13] The question whether Fleming is entitled to an authorization from the Commission to operate to *all* points in Arkansas is not here specially discussed, as the considerations involved are identical with those suggested earlier in our brief (pp. 40–56) concerning the like question in the case of other States.

between May 12, 1935, and the date of the hearing, July 23, 1936, cannot be given the factual significance of abandonment when it is remembered that Fleming's operations are necessarily characterized by interludes in service that are dictated by the sporadic demands of consignees in a specialized line of commodity.[14]

Under the circumstances just reviewed, the District Court's reexamination and redetermination of the question of abandonment was improper.

CONCLUSION

Appellant railroads have failed to establish a right to contest judicially the order made by the Commission on Fleming's application; accordingly, the District Court ought to have dismissed their bill, for want of standing to sue. However, if this Court should decide that appellants were entitled to maintain the bill in the court below and that questions on the merits are required to be decided in this appeal, we submit that the Commission's order is supported by substantial evidence and is in accord with correct principles of law under the applicable statute. It is therefore respectfully submitted that the decree of the District Court should be reversed insofar as it sets aside and mod-

[14] This argument is developed earlier in our brief, pp. 40-56.

ifies the order and certificate of the Commission, and that it should in all other respects be affirmed.

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DECEMBER 1941.

APPENDIX

Statutes involved

Pertinent provisions of the Interstate Commerce Act important in the consideration of this case are:

Part II. "Sec. 206 (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within

one hunderd and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *."

"Sec. 208 (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory

specified in the certificate, as the development of the business and the demands of the public shall require."

Part I. "Sec. 1 (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for

such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which,

or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be lo-

cated wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

U. S. GOVERNMENT PRINTING OFFICE: 1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 110

THE ALTON RAILROAD COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVE-AWAY SERVICE,
Appellees.

No. 267

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVE-AWAY SERVICE,
Appellants,

vs.

THE ALTON RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF THE RAILROADS, APPELLANTS IN NO. 110 AND APPELLEES IN NO. 267, REPLYING TO BRIEFS OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION AND JOHN P. FLEMING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 110.

THE ALTON RAILROAD COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVE-AWAY SERVICE,

Appellees.

No. 267.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND JOHN P. FLEMING, DOING BUSINESS AS JOHN P. FLEMING DRIVE-AWAY SERVICE,

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Scope of This Reply Brief.

Our first brief was entitled in No. 110 only, but we included in it our arguments on the points involved in both the appeal and the cross-appeal. This brief is in reply to

the arguments, attacking our contentions in both appeals, contained in the joint brief of the United States and Interstate Commerce Commission and in the briefs of John P. Fleming.

1.

Plaintiffs Are Parties in Interest Entitled to Maintain This Suit.

(A) EFFECT OF SECTION 222 (b) OF PART II OF THE INTERSTATE COMMERCE ACT.

It is urged (U. S.-Comm. Br., p. 30) that since Section 222 (b) of Part II, 49 U. S. C. A. 322 (b), authorizes the Commission to sue to enjoin violations of some of the provisions of Part II and of orders of the Commission, and since the section confers this right on no one else, this operates by construction to exclude from the scope of Section 205 (g) the right of any person to obtain review in court of an order of the Commission authorizing "grandfather" rights. The unsoundness of this proposition can be demonstrated in a number of ways.

(1) Vesting in the Commission the exclusive right to initiate the proceedings in court described in Section 222 (b) does not evidence any legislative intent to deny to a private party the right to have reviewed in court an order of the Commission involving the subject matter of the Section. At the most it means that *primary jurisdiction* of the subject matter of the section is delegated to the Commission, and that resort may not be had to the courts by a private individual until after the Commission has made an order in the premises. This is demonstrated by familiar principles.

By virtue of Section 204 (c),[1] formerly 204 (d), any per

1. SEC. 204-(c). Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission,

son may make a complaint to the Commission respecting the subject matter of Section 222 (b). Section 204 (c) is similar to Section 13 (1) of Part I. Under 13 (1) a private person may file a complaint with the Commission with respect to a subject matter within the primary jurisdiction of the Commission. A court would have no jurisdiction of that subject matter originally. But after the Commission, pursuant to the complaint, makes an order, a party in interest may then properly seek a review of that order in court. See *Armour & Company* v. *Alton Railroad Company*, 312 U. S. ; Sharfman, The Interstate Commerce Commission, v. II, p. 406.

We may therefore assume, for purpose of argument, that by virtue of Section 222 (b), or some other reason, a private party may not originally resort to a court to determine whether a motor carrier is operating lawfully, since this question is within the primary jurisdiction of the Commission. Upon that argumentative assumption rights similar to those in that part of Section 1 (20) which permits parties other than the Commission to resort originally to a court are not carried into Part II. But we are not here concerned with original resort to a court. Rather, there is here involved another element of Section 1 (20), the right declared in *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, that a competitive carrier may have a judicial review of an order of the Commission granting a certificate. That right is carried into Part II because it is a "right of relief in court * * * now provided in respect to orders of the Commission made under Part I," Section 205 (g). That right cannot be construed away by Section 222 (b) because that right is a right to review of a Commission order, while Section 222 (b) at

after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

the most only defines *primary jurisdiction* of the Commission.

When Section 205 (g) was enacted there existed under Part I the well understood right of "any part in interest" to review in court an order of the Commission granting operating authority, and language to bring that right into Part II could not have been phrased more aptly than in 205 (g).

(2) Section 222 (b) gives the Commission power to enforce the Act and its orders by injunction. It authorizes action by the Commission only against other parties. Section 205 (g) is precisely the converse. It permits a review of a Commission order by "*any* party in interest"; that is, action against the Commission. The two sections are so utterly dissimilar in purpose that the first named cannot diminish any part of the right of judicial review provided by the second.

(3) In construing these sections it is highly pertinent to consider the respective histories of Parts I and II of the Act. Part I as it stands today is the result of slow evolution from small beginnings in 1887.[2] For the first 20 years the Commission had no power to fix rates.[3] Authority to establish maximum rates was conferred in 1906,[4] and to fix minimum rates in 1920.[5] The certificate provisions of Section 1, § (18), (19), and (20), were part of the Act of 1920. The Elkins Act in 1903,[6] and the Mann-Elkins Act in 1910,[7] were important steps in requiring adherence by railroads to their tariffs and broadening the Commission's control over tariffs.

2. 24 Stat. 379.

3. *Cin., N. O. & T. P. Ry.* v. *I. C. C.*, 162 U. S. 184 (1896); 167 U. S. 479 (1897).

4. Hepburn Act, 34 Stat. 584.

5. Transportation Act of 1920, 41 Stat. 456.

6. 32 Stat. 847.

7. 36 Stat. 539.

In contrast, Part II was enacted in 1935 as one whole piece of legislation embodying all of the above mentioned features of Part I. As a consequence Part II, though all inclusive, is simpler in form and far less repetitious than Part I.

The point of the foregoing is that since Congress built Part II as one piece on the pattern of Part I, it plainly brought into Part II by Section 205 (g) just what the Section says, "the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I."

(B) RAILROADS ARE COMPETITORS OF DRIVEAWAY MOTOR CARRIERS.

It is argued (U. S.-Comm. pp. 32-33; Fleming, Nov. 27, pp. 12-13) that there is such a difference between driveway and railroad transportation of automobiles that the two are not competitive; and therefore the railroads have no standing, as competitors for traffic, to maintain this suit.

In view of the facts this argument is so lacking in foundation as to make it doubtful whether the parties who urge it are really serious about it. The Commission, and the motor carriers, have always taken the position that railroad and driveaway transportation of automobiles is fiercely competitive. As pointed out in our first brief (p. 19) the Commission is now engaged in an investigation (in Docket No. 28190, *New Automobiles in Interstate Commerce*) of rates charged for the transportation of new automobiles by railroads and motor carriers, including driveaway carriers, and the relation, if any there should be, between their respective rates.

In *Automobiles from Wisconsin to Minnesota*, 246 I. C. C. 114, I. & S. No. 4943, rates on new automobiles from Kenosha, Wis. to Minneapolis and St. Paul, filed by railroads to compete with motor carriers, both driveaway and truck-

away, were suspended by the Commission on complaint of the National Automobile Transporters Association, Inc. After investigation the order of suspension was vacated and the proposed rates were permitted to become effective. The Commission's report states in part:

> "Prior to November 1937 substantially all of the traffic considered was handled by railroads, but from that time until November 1940 nearly all of it was handled in driveaway service. In November 1940 the bulk of the traffic returned to the rails. In 1941 up to May 19, 123 carloads moved by rail and 30 truckloads moved by truck."

In *Automobiles from Evansville, Indiana, to the South*, 245 I. C. C. 339, I. & S. No. 4835, protest by motor carriers caused suspension of railroad carload rates on automobiles, although the rates were later permitted by the Commission to become effective. The competing motor carriers were truckaway and not driveaway operators. The Commission said (p. 346):

> "Our action herein is without prejudice to the conclusions of the Commission in Docket No. 28190, *New Automobiles in Interstate Commerce*, now pending."

(c) EFFECT OF RAILROADS' PARTICIPATION IN PROCEEDINGS BEFORE THE COMMISSION.

Argument is made that participation by the railroads in the proceedings before the Commission does not give them standing to maintain this suit (U. S.-Comm. pp. 36-40; Fleming, Nov. 27, pp. 15-16). We did not argue this point at any length in our first brief. The last word on this subject seems to be that cited in our first brief, p. 21. With reference to the various cases cited by opposing parties, we think they are answered by a quotation from one of them, *Moffat Tunnel League* v. *United States*, 289 U. S. 113, where the Court said (120-121):

> "The case is utterly unlike *Chicago Junction Case*,

264 U. S. 258, 267; *Western Pacific Cal. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47. and *Claiborne-Annapolis Ferry* v. *United States*, 285 U. S. 382. In each of these a carrier brought suit to set aside an order of the Commission."

We submit that a competing *carrier* who has appeared in the Commission proceedings is, by virtue of that fact, a "'party in interest' in the further pursuit of claims before a court after adverse action by the Commission," *L. Singer & Sons* v. *Union Pacific Railroad Company*, 311 U. S. 295.

2.

The Commission's Order Should Be Annulled.

It is plain from opposing briefs that there is no dispute as to the facts. The statements of the simple and readily understandable facts in our first brief are not criticized. The fundamental question is therefore one of law; whether the operations of a carrier have been those of a common carrier is a question of law, *Producers Transportation Co.* v. *Railroad Commission*, 251 U. S. 228. The definition of a common carrier made by Section 203 (a) (14) of Part II embodies the common law conception. See *Producers Transportation Co.* case, *supra*.

Opposing briefs (U. S.-Comm. pp. 40-55; Fleming, Dec. 10, pp. 2-41) lay much stress upon the discretionary power of the Commission and the special type of Fleming's operations. Both of these factors may be accorded due weight, but they cannot engulf the simple, undisputed, and dominant facts of Fleming's operations. These operations were so meager throughout the entire west and in parts of the southeast as to make any theory that they constituted common carriage clash violently with any ordinary and regular conception of that status.

As an argument that the few shipments carried to points in the west are, nevertheless, sufficient to establish that Fleming was in actual operation as a common carrier to those points throughout the "grandfather" period, both briefs refer to the point that "in view of the marketing characteristics of the industry * * * his service is not one for which there was steady demand." (U. S.-Comm. p. 43; Fleming, Dec. 10, pp. 15-16.)

Now it is common knowledge that there was a steady demand for the transportation of automobiles from Detroit to the points Fleming served, and that a large volume of the automobiles transported moved by driveaway. See pp. 19, 37, our first brief. The few deliveries shown on page 26 of our first brief not only prove that there was no steady demand for Fleming's service but that there was during the 18 months preceding July 23, 1936, no appreciable demand. His service, against the background of the potential demand, consisted simply of sporadic trips that could not be called service to the general public. The fact that "*his* service is not one for which there was steady demand" (emphasis supplied), is simply a confession that while there was a huge demand by the general public for the transportation of automobiles, *his* service was not in demand; that is, *he* was not serving the general public as a common carrier.

As reason for justifying the authorization to serve all points in the west and southeast, although shipments had actually been carried to only a few points, opposing counsel rely on language of the Commission to the effect that "distribution points are constantly shifted from the standpoint of a state-wide area, dealers' accounts are changed, and the volume of sales at a given point may show rapid increases or decreases." (U. S.-Comm. pp. 44, 51-53; Fleming, Dec. 10, pp. 10-14; R. 13.)

This finding (1) is directly contradicted by the undis-

puted facts, and (2) is insufficient justification in any event. Fleming's shipments to Washington, Oregon, and California cover a period of almost two years and there is no evidence of shifting of distribution points. Rather, there are in Washington, and to Portland, Oregon, shipments at long intervals to the same points, and to California and the rest of Oregon, isolated shipments to single points of such few vehicles as to show that no dealer was being served to any consequential extent. The same thing is true with respect to the other states. See our first brief, pp. 48-60. If there had been a "shifting around" sufficient to justify the Commission's theory it would show in the record of shipments.

However, it is submitted that this theory is fundamentally unsound. For instance, a dealer may have actually served Seattle during the "grandfather" period, but it is submitted that the question whether he should be allowed to serve Spokane, which he did not serve during the "grandfather" period, should be determined on grounds of public convenience and necessity Otherwise every carrier that has served any city in the state will have "grandfather" rights to every other city regardless of public need therefor.

3.

The Decree Should Be Affirmed as to Arkansas.

The U. S.-Commission brief states (p. 66): "The issue here between appellants and appellees is whether Fleming's operations into Arkansas were subsequently abandoned."

We submit that this is not the whole issue. All of our argument with respect to the other states is just as applicable to Arkansas; we may rely on any ground to support the decree regardless of the fact that the District Court may have rested its holding on a ground narrower than necessary.

4.

Fleming Was Not in Bona Fide Operation in Oregon and Nebraska.

Only one observation need be made as to arguments on this point in opposing briefs (U. S.-Comm. pp. 56-65; Fleming, Dec. 10, pp. 26-29). As to these two states it is undisputed that Fleming admitted that he was intentionally violating their laws to better serve his own ends (our first brief, pp. 61-66).

There is therefore no need to consider how the Commission is to ascertain what the state law is and whether it has been violated. The laborious arguments on these subjects in the opposing briefs are inapplicable in view of the plea of guilty coupled with testimony showing the plea to be correct.

Conclusion.

One of the opposing briefs (Fleming, Dec. 10, pp. 39-40) closes with much reliance on certain language in *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U. S. 441. The theory assumed to be inherent in this language appears throughout other opposing briefs. That case, however, when duly considered, affords us much support. The Commission had fixed maximum railroad rates after hearing voluminous and conflicting evidence, and the Court refused to set these aside. In distinguishing cases in which orders of the Commission had been annulled, the Court said (p. 457):

> "In *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S. 144, there was passed upon a decision of the Commission that the competition of river lines of transportation was not a factor to be considered when determining whether property transported over the same line is carried under 'substantially similar circumstances and conditions,' as that

phrase is found in the fourth section of the Interstate Commerce Act. The decision was declared to be an erroneous construction of the act.

"In *Louisville & Nashville Railroad Co.* v. *Behlmer* (passing by subordinate questions) the dominant element was the construction of the fourth section of the Interstate Commerce Act. The Commission and the Circuit Court of Appeals, it was said, 'mistakenly considered as a matter of law that competition, however material, arising from carriers who were subject to the act to regulate commerce could not be taken into consideration, likewise that competition, however substantial, not originating at the initial point of the traffic, was equally as a matter of law excluded from view.'

"*In all these cases, therefore, there was a single, distinct and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power.*" (Emphasis supplied.)

It is submitted that in the instant case there is the single, dominant, question of law, the construction of the "grandfather clause," and that the evidence does not satisfy the legal requirements therein laid down. Fleming is seeking to bring himself within an exception to the general rule, and has not done so.

Respectfully submitted,

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DEC 1
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 267

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
JOHN P. FLEMING, an Individual, Doing Business as
John P. Fleming Driveaway Service,
Cross-Appellants,
vs.
THE ALTON RAILROAD COMPANY, et al.,
Cross-Appellees

Cross Appeal from Decree of a Specially Constituted
District Court of the United States for the Eastern
District of Michigan, Southern Division

BRIEF FOR CROSS-APPELLANT, JOHN P. FLEMING

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Cross Appeal from Decree of a Specially Constituted District Court of the United States for the Eastern District of Michigan, Southern Division

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BRIEF FOR CROSS-APPELLANT, JOHN P. FLEMING

OPINIONS BELOW

The Opinion of the specially constituted District Court of three judges convened in pursuance of Sec. 47, Title 28, U. S. C. A. appears in 36 F. Supp. 898 (R. 29). The report of Division 5 of the Interstate Commerce Commission is reported in 8 M. C. C. 469 (R. 8).

STATEMENT OF GROUNDS OF JURISDICTION

Cross-Appellant, John P. Fleming, contends that a right of cross appeal in this proceeding is conferred under the provisions of Sec. 47, Title 28, U. S. C. A. and Sec. 345, Title 28, U. S. C. A.

STATEMENT OF CASE

The Motor Carrier Act of 1935, Part II of the Interstate Commerce Act (U. S. Code, Supp. I, Title 49, Sec. 301-327) was approved August 9, 1935 and became effective October 15, 1935. This Act regulates transportation by motor carriers engaged in interstate operations and prohibits motor common carriers from transporting property in interstate commerce without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, but provides that any such carrier who was in *bona fide* operation on June 1, 1935 "over the route or routes or within the territory for which application is made and has so operated since that time" is entitled to such a certificate without further proof that public convenience and necessity will be served by such operation, if application for such certificate be made within 120 days after the effective date of the Act, to-wit, on or before February 12, 1936.

MOTOR CARRIER ACT, SEC. 206(a), NOW SEC. 206(a) PART II, INTERSTATE COMMERCE ACT. SEC. 306(a) TITLE 49, U. S. C. A.

On or before February 12, 1936, within the time so limited, the Applicant, John P. Fleming, doing business as John P. Fleming Driveaway Service, (the Cross-Appellant here), filed an application with the Interstate Commerce Commission, on the form prescribed by the Commission, for a certificate of public convenience and necessity authorizing the transportation of motor vehicles under their own power between all points in certain designated States, under a claim of "grandfather" rights within the provisions of the above cited section of the Motor Carrier Act, based upon claimed *bona fide* operations conducted on and continuously since June 1, 1935 (R. 46).

On July 23, 1936, pursuant to order of the Commission, public hearing on said application was held at Detroit, Michigan, before an Examiner of the Interstate Commerce Commission. Cross-Appellant, Fleming, appeared by counsel and personally testified and documentary evidence was introduced in support of the allegations contained in said application for "grandfather" authority. *All but four of the rail carrier Cross-Appellees herein appeared by counsel in opposition, but did not present any evidence or testimony in support of their opposition* (R. 10). Certain motor carriers appeared by counsel in said proceedings by way of intervention, but not in opposition, and presented testimony on questions relating to the jurisdiction of the Commission (R. 10).

On September 10, 1937, following the filing of briefs by parties of record, the Trial Examiner's Report and Proposed Order was issued (R. 68), to which exceptions were thereafter filed by protesting rail carriers (R. 78).

On January 19, 1938, pursuant to the order of the Commission, oral argument was held before Division 5 of the Interstate Commerce Commission and was participated in by counsel for the rail carrier protestants as well as by counsel for Applicant, Fleming.

On September 19, 1938, the report of the Interstate Commerce Commission, by Division 5, Commissioners Eastman, Lee and Rogers, was issued, 8 M. C. C. 469, confirming in most essentials the report and proposed order of the Trial Examiner and granting to Applicant, Fleming, a substantial part of the authority for which application was made (R. 8). Thereafter, two petitions for reopening, reviewing and reconsidering the Commission's report and order were filed by protestant rail carriers, to which answer was made by Applicant, Fleming, and which petitions were denied (R. 79, 4, 19, 23, 26).

On July 14, 1939, suit was instituted by the rail protestants in the aforesaid proceedings before the Interstate Commerce Commission, as well as other railroads having not theretofore appeared in said proceedings before said Commission, in the United States District Court for the Eastern District of Michigan, Southern Division, under the provisions of Paragraph 28, Sec. 24, Judicial Code (28 U. S. C. A. 41 (28)) seeking to enjoin and annul the aforesaid order of the Interstate Commerce Commission (R. 3).

On November 26, 1940, hearing was held in said suit at Detroit, Michigan, before a specially constituted District Court of three judges comprised of the Honorable Charles C. Simons, Judge of the United States Circuit Court of Appeals, the Honorable Edward J. Moinet, and the Honorable Frank A. Picard, Judges of the United States District Court. The Opinion of the specially constituted District Court was rendered and filed on January 31, 1941 (R. 29). Final judgment and decree was entered April 7, 1941 (R. 36).

The specially constituted District Court in its opinion, judgment and decree denied Cross-Appellant's motion to dismiss the suit, holding that Plaintiff's (Cross-Appellees here) were proper parties to institute and maintain the suit, and likewise modified the order of the Interstate Commerce Commission by excluding from the certificate authorized thereby Cross-Appellant Fleming's authority to operate into the State of Arkansas (R. 35), otherwise the findings of the Commission and its conclusions of law were adopted as the findings and conclusions of the court except as modified (R. 35, 36).

SPECIFICATION OF ERRORS

I.

The specially constituted District Court erred in holding that Plaintiffs (Cross-Appellees here) were parties in interest within the intent and meaning of Sec. 205(h) of the Motor Carrier Act (now 205(g) of Part II, Interstate Commerce Act) and as such were entitled to institute and maintain the within suit.

II.

The specially constituted District Court erred in holding that the Cross-Appellant, John P. Fleming, had abandoned his operations into, through and out of the State of Arkansas.

III.

The specially constituted District Court erred in modifying the order of the Interstate Commerce Commission decided September 19, 1938 (R. 9) by excluding therefrom Cross-Appellant John P. Fleming's authority to operate into the State of Arkansas.

ARGUMENT

I.

THE CROSS-APPELLEES HAVE NO LEGAL STANDING TO INSTITUTE AND MAINTAIN THIS SUIT

In the trial of this suit before the lower court, defendants, United States of America and Interstate Commerce Commission, presented the main argument concerning the above captioned matter. It is Cross-Appellant Fleming's understanding that said defendants will likewise in this appeal deal exhaustively with such subject matter. However, it is felt that due to the importance of the question, this Cross-Appellant should point out to this court his observations in connection therewith. Therefore, in so doing, this Cross-Appellant will attempt to limit argument concerning this question in order that there shall be a minimum of duplication of argument as between the Cross-Appellants.

A. Cross-Appellees Have No Statutory Authority to Institute and Maintain This Suit.

The Cross-Appellees have consistently taken the position that they are entitled to institute and maintain this suit solely by reason of Section 205(g) of Part II of the Interstate Commerce Act (formerly Sec. 205(h) of the Motor Carrier Act) which provides in part that:

> "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I * * ."

Cross-Appellees take the position that this provision gives them a statutory right to maintain this action in

equity seeking to enjoin and annul the order of the Interstate Commerce Commission granting to Cross-Appellant, Fleming, a certificate of convenience and necessity pursuant to the "grandfather clause" of Part II of the Interstate Commerce Act; and that this legal right to maintain such action is the same as provided with respect to railroads as contained in Sec. 1, Paragraph (20) of Part I of the Interstate Commerce Act. Said paragraph (20) provides as follows:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be *enjoined* by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest* * * *." (Emphasis supplied.)

It is apparent that the phrase "any party in interest" appears both in Sec. 205(g) of Part II and Sec. 1, Paragraph (20) of Part I of the Interstate Commerce Act. However, it will be noted that the above quoted portion of Paragraph (20) of Section 1 in Part I specifically authorizes such party in interest to invoke the equity relief of the courts by injunction, and the right to invoke such equity relief is granted only in the case of a construction, operation or abandonment by a railroad contrary to the provisions of Sec. 1, Paragraphs (18), (19) or (20). The right of a party in interest to invoke such special equity relief is not granted by the statute with respect to all cases arising under Part I of the Interstate Commerce Act nor against all orders of the Commission entered pursuant to the provisions of Part I. On the contrary, the statutory authority to invoke such special relief extends to a party in interest only in the peculiar and special situations specifically described in Sec. 1, Paragraphs (18),

(19) and (20). It is apparent, therefore, that any other orders of the Commission entered under Part I not relating to these special situations are not subject to attack under the special equity relief by injunction proceeding as authorized in Paragraph (20); but in all such other cases a rail carrier seeking such equity relief must show that it is entitled to maintain such action upon the basis of general equity principles which have been long established.

Surely then the provisions of Sec. 205(g) of Part II, above quoted, do not in any sense broaden or extend the right of a rail carrier to invoke the special relief provided in Sec. 1, Paragraphs (18) through (20) of Part I. This section merely provides that a party in interest shall have the same right of relief as is provided with respect to orders issued by the Commission under Part I. The order issued by the Commission in the within proceeding does not apply to the construction, operation or abandonment by a railroad as particularly described in Paragraphs (18) through (20) of Sec. 1 in Part I; consequently, a rail carrier in this proceeding has no more statutory right under the provisions of Part II of the Interstate Commerce Act to invoke equity relief in this court than such rail carrier would have if the order of the Commission had been entered under Part I of the Act. The issue before this court then as to whether or not Cross-Appellees have a right to institute and maintain this suit cannot be determined merely by deciding whether or not such Cross-Appellees are parties in interest. The question is not only whether the railroads are a party in interest within the meaning of Sec. 205(g) of Part II, but after this question has been determined, the court must then decide as to whether or not the railroad's interest is sufficient to justify them in instituting and maintaining this action and in attempting to invoke the special and unusual equity relief which they are here seeking. The

Cross-Appellees have consistently confused this issue and have taken the position that the only question involved is whether or not they are "parties in interest" within the meaning of Sec. 205(g) of Part II. In this connection Cross-Appellant, Fleming, respectfully submits that the record shows Cross-Appellees have not at any time shown that their interest is sufficient to justify them in maintaining this independent suit and in seeking this special relief; which matter will be more fully treated under Part B of the within Argument.

It must be conceded that if the order of the Interstate Commerce Commission in the within proceeding pertained to the construction, operation or abandonment of a railroad, the Cross-Appellees would then be entitled to invoke the equity relief provided for in Sec. 1, Paragraph (20) of Part I. The specially constituted District Court in its Opinion cites the decisions of this court in the cases of *Texas and Pacific Railroad Company v. Gulf, Colorado and Santa Fe Railroad Company*, 270 U. S. 266, and *West Pacific California Railroad Company v. Southern Pacific*, 284 U. S. 47, in support of its holding that the Cross-Appellees are proper parties in interest within the intent and meaning of Sec. 205(g) of Part II. The court found that the Cross-Appellees and the Cross-Appellant, Fleming, are equally engaged in the transportation of automotive vehicles and that, therefore, the Cross-Appellees are possessed of a special and peculiar interest within the rationale of these two cases. However, it should be pointed out that the question before the court in the cited cases was merely as to whether or not a competing railroad was a "party in interest" within the intent and meaning of Sec. 1, Paragraph (20) of Part I. The court in said cases having determined that a competing railroad was a party in interest, there was no question but that such railroad had a right to maintain an injunction pro-

ceeding under the provisions of Sec. 1, Paragraph (20) of Part I, because the questions at issue in said cases involved the matter of the construction, operation or abandonment of a railroad as specifically described in said Paragraph (20) of Part I.

However, in the within proceeding, the questions in issue are distinctly different. Sec. 205(g) of Part II does not say that a party in interest can maintain an independent suit for an injunction and does not attempt to define what the rights of a party in interest may be, except by general reference to Part I. Cross-Appellant, Fleming, sincerely believes that both the Cross-Appellees and the specially constituted District Court have failed to recognize this question and that by reason thereof the District Court has failed to determine the same.

It is apparent then that even if the Cross-Appellees are parties in interest within the rationale of the two cases above cited, they still have no statutory right to maintain this independent injunction proceeding since this proceeding does not involve any one of the special and peculiar questions of railroad operations specifically described in Sec. 1, Paragraph (18) through (20) of Part I. Therefore, it would seem apparent that if the Cross-Appellees have any legal standing to maintain this action, such standing must depend wholly upon general equity principles and not upon special statutory authority.

B. Cross-Appellees Have No Standing to Institute and Maintain This Suit Under General Principles of Equity.

It would appear that the Cross-Appellees' ultimate purpose in bringing this action is to prevent the Cross-Appellant Fleming from continuing the transportation of automobiles by the "driveaway" method, which transportation the Cross-Appellees contend is competitive with their transportation of automobiles by railroad. There is no contention that the Cross-Appellant Fleming's so-called competition has been unfair in any legal sense and there is no suggestion of fraud or misrepresentation or deceit on the part of Cross-Appellant Fleming affecting the rail carriers. The Urgent Deficiencies Act, under which this suit is brought, prescribes the procedure to be followed in suits which involve orders of the Commission, but this Act makes no change in the substantive law applicable to injunction suits. It has been repeatedly held that a court of equity will act only to preserve a clear legal right of the party seeking its aid; and the function of the court is not to prevent a violation of law but to protect direct legal interests, and the complainant must have something more than a common concern for obedience to law. (*Massachusetts v. Mellin*, 263 U. S. 447, 448.)

This principle is best expressed perhaps in the case of *Western Pacific Railroad Company v. Southern Pacific Company*, 284 U. S. 47, wherein the court made reference to its decision in the case of *Texas & Pacific Railway Company v. Gulf Colorado and S. F. Railway Company*, 270 U. S. 266. In the Texas & Pacific Railway case, the Plaintiff railway sought an injunction to prevent a competitor from building an unauthorized extension into territory already served by Plaintiff. The Plaintiff brought its action seeking an injunction under the provisions of Sec-

tion 1, Paragraph (20) Part I, and the question was raised as to whether the Plaintiff as a competing railroad was a proper party to institute and maintain such action. As set forth hereinabove, the court found that the Plaintiff railroad was a proper party, but based such finding solely and entirely upon the specific language of said Paragraph 20. This court on p. 51 of its decision in the Western Pacific case, in referring to its decision in the Texas & Pacific case, stated as follows:

> "The Texas & Pacific Railway sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition."

It is apparent from this decision that general principles of equity would not entitle the Cross-Appellees in this proceeding to institute and maintain this action seeking equity relief by injunction; and evidently Cross-Appellees concur in this argument since they have constantly maintained that their right to prosecute this action does not depend upon general principles of equity but rather upon the specific statutory authority contained in Sec. 205(g) of Part II and Sec. 1 Paragraph (20) of Part I.

This argument is conclusively supported by the record in the within proceeding, and the facts developed therein. The Cross-Appellees are common carriers by rail and as such engage in the transportation of automobiles in rail cars. On the other hand, Cross-Appellant Fleming transports automobiles over the highway and solely under their own power by the "driveaway" method, as defined and described by the Commission in its order of August 9, 1937, in *Ex Parte* MC 10. Therefore automobiles trans-

ported by Cross-Appellees are delivered to destination as new cars which have not been driven more than a few miles; while those automobiles transported by the Cross-Appellant Fleming have been driven under their own power from point of origin to point of destination. Therefore there is a distinct and fundamental difference between the two mediums of transportation, and as a result the charges for such transportation services are widely divergent. It is difficult to conceive how there can be any actual or real competition between the Cross-Appellees and the Cross-Appellant Fleming. Shippers who desire the particular type of transportation service offered by Cross-Appellees will undoubtedly continue to use such services; whereas shippers who desire the particular driveaway transportation of automobiles as offered by Cross-Appellant Fleming will utilize such type of service either by the Cross-Appellant Fleming, or if his service is not available, then by some other carrier offering such driveaway transportation, or by driving the cars themselves as private carriers.

This fact was apparently recognized by Cross-Appellees at the time of the hearing before the Trial Examiner of the Interstate Commerce Commission, since no testimony or other evidence of record was offered by Cross-Appellees to show the nature of their service or the damage, if any, which would result to their business if the requested authority was granted to the Cross-Appellant Fleming. Throughout the entire history of this proceeding, the Cross-Appellees have entirely failed to allege or to prove that they will suffer irreparable damage or indeed any special damage whatsoever by the continuance of the Cross-Appellant Fleming's operations.

The Cross-Appellees may argue that they are entitled to prosecute this action upon general equity principles in

view of the decision of the Three-Judge Federal Court in the case of *Consolidated Freight Ways, Inc., v. United States et al.*, 34 Fed. Supp. 576. In that case, it was held that a motor carrier plaintiff possessed sufficient standing to bring suit to enjoin the operations of a competitor under an allegedly void order of the Interstate Commerce Commission. However, the evidence of such case showed that both the Plaintiff and the competing Defendant operated in the same manner, transported the same kind of commodities in the same kind of vehicles, and drew their patronage from the same classes of shippers; and furthermore, that the Plaintiff in such case, without operating to capacity, had carried all the freight which had been offered prior to the beginning of the new operations by the Defendant. However, in the within proceeding there is no evidence that the Cross-Appellees' operations are similar to or directly competitive with those of the Cross-Appellant Fleming. In fact there is no evidence whatsoever with respect to this question and Cross-Appellees have made no effort to present any such evidence. The Cross-Appellees have merely alleged that they are competitors with Cross-Appellant Fleming and are prejudiced and injured by the Commission's order but they have totally failed to allege or show that the continuance or non-continuance of the Cross-Appellant Fleming's operations would have any effect upon the prosperity of the Cross-Appellees or would in any way damage their business. There is entirely lacking in this case any suggestion of direct legal damage, present or prospective, against which a court of equity should operate to protect the Cross-Appellees.

C. The Cross-Appellees Have No Standing to Institute and Maintain This Suit by Reason of Their Intervention in the Proceedings Before the Interstate Commerce Commission.

The Cross-Appellees in this proceeding were permitted to appear and participate in the hearing before the Interstate Commerce Commission, but surely this circumstance does not in and of itself entitle the Cross-Appellees to any standing in this court to originate and prosecute the within separate and independent action. In other words, the action of the Commission in permitting the Cross-Appellees to participate in the proceeding before it is in no way binding upon this court and does not in any way guarantee to the Cross-Appellees that they shall have a legal right to maintain and prosecute the instant suit. Whether or not they have a legal right and a proper standing to institute and maintain this suit must necessarily depend upon a determination of the two issues hereinbefore argued, and certainly cannot depend upon whether or not the Commission has permitted them to participate in a hearing before such Commission.

This principle was clearly set forth in the case of *Sprunt & Son v. United States*, 281 U. S. 249, at page 254 wherein the Plaintiffs sought to set aside an order of the Commission which the Plaintiffs contended deprived them of a competitive advantage over their business rivals. In this case this court held:

> "*The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under Sec. 3 of the Interstate Commerce Act. For, their competitive advantage was threatened.* Having this interest, they were entitled to intervene in that administrative proceeding (before the Commission). And if they did so, they became

> entitled under Sec. 212 of the Judicial Code *to intervene as of right in any suit* 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to *maintain an independent suit*, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. *And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.* In the case at bar, the appellants have no *independent right* which is violated by the order to cease and desist." (Emphasis supplied.)

This proposition was again clearly laid down by this Court in the Case of *Pittsburgh & West Virginia Railway Company v. United States*, 281 U. S. 479 wherein the court in discussing its holding in the Sprunt case stated:

> "* * * the mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it. *Sprunt & Son v. United States, Ante*, P. 249."

(See also *Moffat Tunnel League v. United States*, 289 U. S. 113)

It would appear therefore from the foregoing holdings of this court that the Cross-Appellees' standing in this proceeding must again depend upon the determination of the two issues heretofore discussed and must be based upon something more substantial than mere participation in the Commission proceedings which gave rise to the order here involved. The mere fact that the Cross-Appellees were permitted to enter an appearance as

protestants in the proceeding before the Commission has no bearing upon the determination of the question as to whether or not such Cross-Appellees should be permitted to institute and maintain an independent action seeking special relief from this court by way of injunction.

II.

CROSS-APPELLANT FLEMING IS ENTITLED TO AUTHORITY TO CONTINUE HIS OPERATIONS IN THE STATE OF ARKANSAS

The specially constituted District Court held in its decision that the record discloses Cross-Appellant Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that state his operations had been abandoned; and accordingly the court found that Cross-Appellant Fleming was not entitled to authority to operate in the State of Arkansas. The Cross-Appellant Fleming takes the position that the court erred in weighing the evidence and in making such a statement of fact with respect to operations in Arkansas after the Interstate Commerce Commission upon substantial evidence before it, had reached the conclusion that Fleming's operations in Arkansas had not been abandoned and that Fleming was entitled to operating authority in such state.

It was the declared policy of Congress, in its enactment of the Motor Carrier Act, 1935, "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical and efficient service by motor carriers, etc."

Motor Carrier Act, 1935, Section 202(a).

The provisions of the Motor Carrier Act, 1935, were made applicable to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation and of the procurement thereof, and the provision of facilities therefor, is hereby fixed in the Interstate Commerce Commission."

Motor Carrier Act, 1935, Section 202(b).

The Act imposes a duty upon the Commission to regulate common carriers by motor vehicle and to administer, execute and enforce the provisions of the Act and to prescribe rules, regulations and procedure for such administration.

Motor Carrier Act, 1935, Section 204(a).

It will be quite evident by a reading of the Motor Carrier Act, 1935, that Congress, prior to its enactment of the regulatory act, had familiarized itself with the motor carrier industry and recognized that motor carriers of property could not be placed in one general category and regulated as such without proper recognition of certain differentiations between such carriers, based upon inherent characteristics requiring peculiar treatment. In Section 204(b) of the Act, Congress gave the Commission power to establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" as the "special nature of the services performed by such carriers or brokers shall require." In the so-called "grandfather clause" of the Act, Section 206(a), Congress provided that carriers in *bona fide* operation on June 1, 1935 could, upon proper application, secure operating authority without further proof of public

convenience and necessity upon introduction of evidence showing *bona fide* operations on June 1, 1935 and continuously thereafter "over the route or routes or within the territory for which application is made."

In Section 208(a) of the Act, Congress provided that any certificate issued to a carrier under the "grandfather clause" or otherwise "shall specify the services to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." By the use of the language last above quoted, Congress evidenced a familiarity with the distinction between motor carrier operations over fixed routes and between fixed termini, as opposed to operations over regular routes within a territory, and the United States Supreme Court has so interpreted the Congressional intent.

> "The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the 'route or routes' for which an application under the 'grandfather clause' is made as against operations 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular routes bus operations between fixed termini. Such recognition is implied also in the provision of §208(a), 49 U. S. C. A. §308(a) that 'Any certificate issued under §206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini the territory within which, the Motor Carrier is authorized to operate.' "
>
> *U. S. v. Maher,* 307 U. S. 148.

In October, 1935, the Commission prescribed certain forms for use by motor common carriers of property seeking certificates of public convenience and necessity under the "grandfather clause" of the Act and certain other forms for use by motor common carriers of property in making application for certificates of public convenience and necessity under the remaining provisions of the Act and in each such form the Commission requested a sworn statement as to whether the commodities transported were general commodities or special commodities and whether the operations were performed over regular routes or over irregular routes. If the operations were performed over regular routes, the applicant was requested to designate the terminal origin, terminal destination and intermediate and off-route points served. If the operations were over irregular routes, the applicant was requested to designate the place, places or territory where the main volume of traffic was obtained and the place, places or territory to which such traffic was transported. Obviously, such information would be necessary in order for the Commission to meet the requirements of Section 208(a) in its issuance of authority by specifying the service to be rendered and the routes, fixed termini, if any, or territory within which the applicant should be authorized to operate.

On August 9, 1937, the Commission issued its order Ex Parte MC-10, classifying brokers and motor carriers of property. The Commission cited, as its authority for the adoption of its classification report, the provisions of Section 204 of the Act hereinbefore cited. It stated that need for a classification arises out of the fact that carriers are of various, distinct and differing types and that identification of these types will, in itself, tend to facilitate the process of regulation and that the differing types often require differing characters of regulation.

The Commission further states that it is obvious that such classification is particularly important in connection with the issuance of certificates as it will facilitate the identification and description of the operations to be covered by such authority. The Commission reasoned that provisions should be made for each major type of operation present in the industry today and that practical classification "must not only provide a satisfactory operating sphere for each kind and major type of operator now in existence, but it must also avoid the danger of establishing restrictions which might be burdensome to the industry. The public interest requires that the way be left open for a normal, healthy growth. Any plan which would retard such growth would defeat the purpose of the Act. We have been fully cognizant of these facts throughout the course of our study of this matter."

The Commission pointed out that prior to the issuance of the classification order, its representatives had visited many sections of the country and had interviewed representative operators and representatives of motor carrier organizations and had circularized tentative drafts with a request for constructive criticisms and suggestions. In its issuance of the classification order the various suggestions were incorporated to the best of the Commission's ability.

The classification report separates carriers of property into four well recognized categories, namely, common carriers, contract carriers, private carriers and exempt carriers. It further classifies such carriers on the basis of physical operations into regular route scheduled service, regular route non-scheduled service, irregular route radial service, irregular route non-radial service, and local cartage service. The classification order ultimately places all carriers of property in one or the other of some seventeen

special classes, ranging from carriers of general freight in Class 1 to Class 17, carriers of specific commodities not-grouped. Carriers of motor vehicles are specially classified under group 9, and in discussing this group the Commission says that the group covers transporters of motor vehicles by both truckaway method and driveaway method and that the operations conducted by this group are usually over irregular routes, either in radial movements from a fixed origin to destinations with a radial territory, or pure territorial operations over irregular routes "to, from and between unlimited points of origin and unlimited points of destination within the territory served by such carrier, over irregular routes, in either direction outbound, or back-haul, or in cross movements."

The sworn representations contained in Fleming's application for grandfather authority, together with the documentary evidence introduced in support of the application, and the sworn testimony of Fleming at the public hearing on his application, clearly place his operations within Class 9 of the Commission's Classification Report. The testimony and other evidence shows without dispute that Fleming was engaged in the transportation of motor vehicles, xclusively, and did not confine his operations to a scheduled service over fixed routes and between fixed termini, but offered his services on call to the general public which required operations over irregular routes within the territory offered to be served. The Trial Examiner's report and recommended order in the Fleming case was issued approximately one month following the issuance of the Commission's classification report, and the Commission's final decision, now under attack, was issued approximately one year later.

Prior to the issuance of the Fleming order, and even prior to the issuance of the classification report, the Com-

mission had decided in the case of an automobile transporter seeking grandfather authority that territorial service should be permitted.

> "It obviously was not the intent of the Congress that a carrier must have been in physical operation to all points to which such carrier claims to have rendered service, on the exact date specified in the statute. It is apparent that if such were the intent and purpose of the 'grandfather' clause provision, the effect would be to destroy the business of many small irregular operators, who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date. A more appropriate view of the application of the 'grandfather' clause date in such cases is that a carrier is entitled thereunder to claim the territory or the points which it might reasonably have served by reason of its operations prior to, as well on, the statutory date, and subsequent thereto. In other words, the question in such cases is: What was the extent of the transportation business honestly and openly carried on by the carrier as of that date?"
>
> *George Cassens & Sons*, 1 Motor Carrier Cases 771 (774).

Likewise in a case involving an automobile transporter, decided a few months before the Fleming decision, the Commission again recognized the appropriateness of granting territorial authority to this type of specialized hauler.

> "It is readily apparent that, in defining the territorial limits of a service, such as applicant's, involving a single commodity which does not move directly into the smaller towns because of the absence of dealer-agents, and, except in the larger cities, moves only to a single consignee in each of

> the towns where deliveries are made, a broader grant of authority is appropriate than in the case of services which involve the transportation of numerous commodities moving regularly to all points. It obviously was not the intent of Congress to require that a carrier serve each and every point within a certain territory in order for it to be granted authority under the 'grandfather' clauses of sections 206(a) and 209(a) of the Motor Carrier Act, 1935, to operate over irregular routes to any point within that territory. Otherwise, the business of many irregular-route operators would be destroyed, since many of them have not served every point in the territory for which authority is sought. A more appropriate view is that a carrier is entitled to claim the right to transport to destinations in a particular territory if service has been rendered to most of the points therein prior to the statutory date and if the service has been rendered continuously since except for interruptions in service beyond the carrier's control. This would seem to be particularly true where a carrier transports only one commodity to constantly changing points of destinations and where it is bound under a contract to render a territorial service over irregular routes."

L. C. Robertson, 8 Motor Carrier Cases 32 (33).

In Fleming's case before the Commission, the Trial Examiner pointed out in his report that the railroad protestants were contending that Fleming's authority should be confined to service to the points which he had actually served, and then stated:

> "In deciding that question it is necessary to take into consideration the type of operation, the frequency of the demand of the shippers for which the carrier hauls, and the needs of the public. The record is convincing that applicant's operations are

irregular in nature and necessarily so because of conditions in the industry. The same frequency of service which might be required of a general commodity hauler cannot be imposed on a carrier of a special commodity such as automotive vehicles, nor can operations be confined within the same narrow limits. To place on applicant the restrictions contended for, might well destroy applicant's usefulness."

Sheet 12 of Examiner A. E. Later's Report.

In the Commission's report underlying its grant of authority to Fleming, now here under attack, the evidence of shipments filed by Fleming is carefully analyzed and the Division then states:

"It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the States served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specified points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which the automobile manufacturers have established distribution facilities; a manufacturer could not for many reasons appoint an indefinite number of dealers or distributors for a given territory. Approximately 1,200 vehicles were transported by applicant in the period from January 1934, to June 1935, yet relatively few points were served. This further indicates that appellant's opportunity for service was found at a very limited number of distribution points. An exhibit introduced at the hearing contains figures and

supporting data based upon which it is estimated that in the year 1935, less than seven percent of all new automobiles sold in twenty-four western States were transported by the driveaway method.

"As basis for authority to serve all points in a State, applicant points out that distribution points are constantly shifted from the standpoint of a State-wide area; dealers' accounts changed; and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206(a) of the act, the provisions of which require in substance that the authority granted shall permit a carrier to conduct the *bona fide* operations it was conducting on June 1, 1935. In *Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M.C.C. 594, we said that: 'In the case of a common carrier of household goods or of oil field supplies, serving a large territory over irregular routes, we grant certificates under the "grandfather" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "grandfather" certificates to haul "general commodities", that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business.' It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends, for its traffic, entirely upon one industry. This principle should obtain especially where the traffic in question is available only

through the distribution and sales of such commodities as automotive vehicles.

"Applicant was engaged in furnishing a highly specialized transportation service. Direct competitors appear to have been few in number, although the record contains no definite statement concerning this phase of the operating conditions. Applicant's service was, according to our view, necessarily confined to deliveries at a very few points, and future opportunity of obtaining traffic, no doubt, will be likewise limited. This is true even though applicant has at all times held his services out to the public generally.

"Protestants' principal arguments are directed to questions of whether applicant may serve all the points in the States for which application is made; whether, in view of infrequent service to various points in the States claimed, certain rights were not thereby abandoned; and whether applicant should or should not be limited to the particular routes from Detroit to key points in the territory actually served, deliveries thereafter to be made over irregular routes. In deciding these questions, it is also necessary to take into consideration the type of operation, frequency of the demand of the consignees for which the carrier performs transportation services, and the nature of the industry served. The record is convincing that the applicant's operation have been, and will continue to be, irregular in nature because of conditions under which he may secure traffic. The same proof with respect to territory served that might be required of a general commodity hauler, therefore, cannot be imposed, nor can operations be confined within the same definite limits. Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington, such restrictions apparently would not be in accordance with the

> operations performed on the statutory date. The fixing of specific termini would also prevent his rendering the type of service he has been performing."

It should also be noted that the Commission specifically considered the Cross-Appellant Fleming's operations in Arkansas in its order of September 19, 1938, by Division 5 wherein the Commission stated on Sheet 4:

> "Operations to Arkansas, Texas, Oregon and Washington were not started until 1935. It appears, however, that by June 1, 1935, a fair volume of traffic had been moved. The three shipments to Arkansas aggregated 25 vehicles; four shipments to Texas aggregated 14 vehicles; four shipments to Oregon aggregated 24 vehicles; and five shipments to Washington aggregated 28 vehicles."

The language used by the Commission in this proceeding is not cited as legal authority for the order issued by the Commission, but rather as an indication that the Commission had before it substantial evidence and gave careful consideration to such evidence and decided the case, not arbitrarily and capriciously, but according to its own best judgment in the public interest. It must be remembered that the hearing before the Trial Examiner in this proceeding was held on July 2nd, 1936, at which time the Cross-Appellant, Fleming, introduced his documentary evidence of operations, which evidence had been necessarily prepared some little time prior to the hearing. In this connection it should be borne in mind that the provisions of the Motor Carrier Act 1935 did not require that grandfather applications be filed until February 12, 1936, the hearing on applicant's application thus being one of the first of such hearings. It is therefore apparent that the list of shipments submitted by Cross-Appellant, Fleming,

showing no movements into Arkansas after May of 1935, indicates only that there were no shipments into Arkansas for approximately one year after that date, it certainly does not necessarily prove that Cross-Appellant, Fleming, had abandoned operations into Arkansas. On the contrary, the entire evidence of record, and above quoted portion of the Commission's decision, indicates that the very nature of Cross-Appellant, Fleming's, operations was highly irregular, highly specialized, and service was often infrequent to any particular point. The Commission carefully analyzed these factors and their relation to the operating authority which should be granted to Cross-Appellant Fleming. The evidence shows, and the Commission found, that Fleming had been in actual physical operation within the entire territory granted since 1932, offering services generally to anyone requesting such service in the transportation of a highly specialized commodity by a highly specialized method with resultant inherent restriction on the amount of traffic available, but with corresponding and compulsory lack of confinement to specific destinations due to the characteristics of the transportation service and the characteristics of the distribution methods employed by motor vehicle manufacturers.

The question of what proof is necessary in order to entitle the Cross-Appellant, Fleming, to authority in the State of Arkansas is essentially the same as the question of what proof is necessary to support the balance of the Commission's order. The Cross-Appellees have contended that Cross-Appellant, Fleming's claimed operations are not supported by the "requisite quantum" of evidence. What is the required showing and what is the requisite quantum with respect to Cross-Appellant, Fleming's operations in Arkansas, or for that matter, in the entire territory claimed by Fleming?

The Motor Carrier Act does not establish a standard nor has the Interstate Commerce Commission by regulation established a standard. Fleming answered every question and gave every bit of information required by the Interstate Commerce Commission in the application forms which it prescribed, and offered in evidence such proof as he and his counsel deemed necessary in order to support the sworn allegations in his application for operating authority. The evidence submitted satisfied the Trial Examiner, and subsequently satisfied the Commission. It did not satisfy the railroad protestants, and they attempted, by petitions to reopen, to substitute their judgment for that of the Commission. Having failed in this attempt, they now ask this Honorable Court to substitute its judgment for that of the Commission. At the same time the railroad plaintiffs are unable to assist this Honorable Court by stating what the standard should be. In their pleadings, the railroad plaintiffs admit that the Commission's order was correct in some of its aspects and incorrect in others, but it is unable to draw the line of distinction between that which is justified and that which is not justified. If this Honorable Court attempts to establish such standards and to make such determinations, it may open the door to judicial review of every order which has been entered by the Interstate Commerce Commission in connection with the "grandfather clause" applications under the Motor Carrier Act, 1935.

We submit that it is a well recognized principle of law that in the absence of proof of irregularity in a proceedings before an administrative tribunal, and in the absence of proof that such tribunal committed error in its application of rules of law or in its interpretation of the law, its findings of fact should be treated as conclusive and not subject to judicial review. The Court should not consider the weight of the evidence before the Commission nor test

the soundness of the Commission's reasoning nor substitute their judgment for that of the Commission.

Virginia Railway Co. v. U. S., 272 U. S. 658.

> "The argument for the petitioners necessarily invites the Court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the Court."
>
> *The Los Angeles Switching Case*, 234 U. S. 294 (314).
>
> "The judicial function is exhausted when there is found to be a rational basis for the conclusions by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the fact of its report."
>
> *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282 (287).

The administration and enforcement of the Motor Carrier Act, 1935, was delegated by Congress to the Interstate Commerce Commission, which is a body peculiarly fit, by reason of personnel and experience, to decide questions involving transportation in interstate commerce. Accordingly, the interpretations of the Act made by the Interstate Commerce Commission and its administrative practices thereunder should not be disturbed in the absence of compelling reasons, based upon arbitrary or legally erroneous action.

Nearly thirty-five years ago, the Supreme Court of the United States had occasion to review action taken by the Interstate Commerce Commission in which counsel for appellants, in his oral argument, and in supplemental brief, said:

> "I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this court."

Mr. Justice McKenna, delivering the opinion of the Court, answered:

> "To what, then, shall we resort? How shall we determine what 'principles of transportation law' were involved? How determine whether they were recognized and applied, or denied and rejected by the Commission, and, necessarily, by the Circuit Court? An examination of the testimony by concession of counsel is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648; *East Tenn. Etc. Railroad Co. v. Interstate Commerce Commission*, 181 U. S. 1, 27. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to 'knowledge of conditions, of environment and of transportation relations,' has had the witnesses before it and has been able to judge of them and their manner of testifying."
>
> *Illinois Cent. R. R. v. Inter. Com. Comm.*, 206 U. S. 441 (454).

This line of judicial thought has continued through the years and more recently, since the passage of the Motor Carrier Act, 1935, the United States Supreme Court,

speaking through Mr. Justice Frankfurter, has had occasion to state, referring to the Motor Carrier Act, 1935:

> "By this legislation, Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission."
>
> *U. S. v. Maher*, 307 U. S. 148 (153).

This general underlying legal thought has been aptly phrased by Mr. Justice Cardozo, in speaking of another administrative body, in the following language:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its command as to leave nothing for construction. True it is also that administrative practice consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *U. S. v. Moore*, 95 U. S. 760-763; *Logan v. Davis*, 233 U. S. 613 (627); *Brewster v. Gage*, 280 U. S. 327, 336; *Fawcus Machine Co. v. U. S.*, 282 U. S. 375; *Interstate Commerce Comm. v. N. Y., N. H., and H. C. Co.*, 287 U. S. 178. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co. v. United States, supra.*"
>
> *Norwegian Nitrogen Products Co. v. United States*, 28 U. S. 294 (315).

CONCLUSION

On the basis of the facts of record in the instant case, as hereinbefore outlined, interpreted in the light of the decisions which have been cited, we respectfully submit on behalf of Cross-Appellant Fleming that the specially constituted District Court was in error in holding that the Cross-Appellees herein were parties in interest and were entitled to institute and maintain the within suit either by virtue of special statute or under the commonly accepted principles of equity. We also respectfully submit that the specially constituted District Court was in error in making a judicial determination that the Cross-Appellant John P. Fleming had abandoned operations into, through and out of the State of Arkansas and, based upon such judicial determination, in modifying the order of the Interstate Commerce Commission by excluding from such order authority in Cross-Appellant John P. Fleming to operate into the State of Arkansas.

Respectfully submitted,

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Dated: Detroit, Michigan,
November 27, 1941.

SUPREME COURT OF THE UNITED STATES.

Nos. 110 and 267.—October Term, 1941.

The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, et al., Appellants,		
110	*vs.*	
The United States of America, Interstate Commerce Commission and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service.		Appeals from the District Court of the United States for the Eastern District of Michigan.
The United States of America, Interstate Commerce Commission and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service, Appellants,		
267	*vs.*	
The Alton Railroad Company, et al.		

[January 12, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases are an appeal and a cross appeal under § 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code as amended (28 U. S. C. § 345) to review a final decree of a district court of three judges (28 U. S. C. § 47) which modified in part and sustained as modified (36 F. Supp. 898) an order of the Interstate Commerce Commission (8 M. C. C. 469) granting appellee Fleming a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206(a)) of the Motor Carrier Act of 1935.[1] 49 Stat. 543, 551, 49 U. S. C. § 306.

[1] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

The findings of the Commission may be briefly summarized as follows: Fleming on and since June 1, 1935, was engaged in *bona fide* operation as a common carrier by motor vehicle "in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis." This driveaway or caravaning method of transportation is performed by individual driving of the vehicle under its own power, by driving one vehicle under its own power and towing a second vehicle attached to the first, or by driving under its own power a vehicle upon which another vehicle is partially or wholly mounted. Shipments by Fleming originated from the factories of automobile manufacturers in Detroit, Michigan, and were made to dealers and distributors in various states. Certain new cars were returned to Detroit in the same manner. Fleming commenced operations in 1933 and between January 1, 1934 and June 1, 1935 transported shipments to one point each in Arkansas and Alabama; to two points each in California, New York, Pennsylvania and Tennessee; to three points each in Washington, Oregon, Kentucky and North Carolina; to four points in Texas; to five points in South Carolina; and to seven points in Georgia. About 1200 vehicles were transported in this period and more than 2100 from 1933 to July, 1936, the time of the hearing. Shipments consisted of from one to sixteen vehicles, shipments of two and four being the most common. Fleming's service was confined to deliveries at very few points in several states due to the fact that he was furnishing a highly specialized transportation service from manufacturers to dealers and distributors. Shipments to most of the states named were numerous. Shipments to other states were fewer in number. Thus the three shipments to Arkansas aggregated twenty-five vehicles, the four shipments each to Texas and Oregon aggregated fourteen vehicles and twenty-four vehicles respectively, and the five shipments to Washington aggregated twenty-eight vehicles. Operations in those four states started just prior to June 1, 1935; but they were sufficient in scope to establish that Fleming was in *bona fide* operation in them on the statutory date. Fleming held his services out to the public generally as a common carrier and operated as such; and he held himself out to transport by the driveaway method between any points in the states for which application was made.

Though his transportation of shipments was restricted to a few points in each of the enumerated states, the Commission held that

he was entitled to transport to all points in all of the states served, with the exception of New York and Pennsylvania as respects which the application was denied. The District Court sustained the order of the Commission in all respects except the operation in Arkansas. As to that it held that his service had been abandoned.

We are met at the outset with the question of the standing of the appellant railroad companies—seventy-one in number—to bring and maintain the suit in the District Court. All but a few intervened in the hearing before the Commission. Each is a common carrier and a competitor of Fleming in some portion of the territory which Fleming is authorized to serve. They rest their right to sue on § 205 (h) of the Motor Carrier Act[2] (49 U. S. C. Supp. V, 305 (h)) which provides that "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . . ." Sec. 1 (20) of Part I (49 U. S. C. § 1 (20)) authorizes "any party in interest" to sue to enjoin any construction, operation or abandonment of a railroad made contrary to § 1 (18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission but also where it proceeds under a certificate of the Commission whose validity is challenged. *Alabama-Annapolis Ferry Co. v. United States*, 285 U. S. 382. Hence we conclude that § 205 (h) has incorporated by reference the "party in interest" provision of § 1 (20). We do not stop to inquire what effect, if any, the status of appellant railroad companies as intervenors before the Commission had on their right to bring and maintain this suit. Cf. *Chicago Junction Case*, 264 U. S. 258, with *Pittsburgh & West Virginia Ry. Co. v. United States*, 281 U. S. 479. They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 13-27. They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within the meaning of § 205(h)

[2] Now § 205(g) of Part II of the Interstate Commerce Act. 54 Stat. 922; 49 U. S. C. § 305(g).

under the tests announced in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; and *Chaborne-Annapolis Ferry Co.* v. *United States, supra.*

The appellant railroad companies earnestly contend that the Commission was without authority to authorize Fleming to serve a whole state where, as here, his services had been in fact limited to only a few points in the state. The argument is that any right obtained under the "grandfather clause" should be delimited to the actual area in which the applicant was in *bona fide* operation during the period in question. Sec. 206(a) provides for the issuance of a certificate of public convenience and necessity without proof beyond the fact that the applicant or his predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made . . . and has so operated since that time." Sec. 208(a) provides that such certificate "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." The authority granted Fleming was to operate in the designated territory "over irregular routes" through specified states. It is plain from the statute that operations need not be restricted to specified routes or between fixed termini. But the question remains as to the power of the Commission to authorize operation in an entire state where only a few points in that state had been served.

"Territory" is not a word of art. The characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial scope of the operations which may be authorized under the "grandfather clause". While the test of "bona fide operation" within a specified "territory" includes "actual rather than potential or simulated service" (*McDonald* v. *Thompson*, 305 U. S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have restricted prior operations to but a few points in a wide area which the carrier held itself out as being will

ing and able to serve. The Commission has taken the characteristics of various transportation services into consideration in determining the scope of the territory covered by certificates under the "grandfather clause". Thus operations on irregular routes within a wide territory have been authorized in case of common carriers of household goods. *Bruce Transfer & Storage Co.*, 2 M. C. C. 150, *William J. Wenck*, 12 M. C. C. 150. Similar broad authority has been granted common carriers of oil field equipment and supplies. *Charles B. Greer, Jr.*, 3 M. C. C. 483; *Union City Transfer*, 7 M. C. C. 717; *L. C. Jones Trucking Co.*, 9 M. C. C. 740. And a like result has been reached in case of automobile transporters such as the applicant in the instant case. *George Cissens & Sons*, 1 M. C. C. 771. And see *Charles E. Danbury*, 17 M. C. C. 243. The general theory underlying the household goods cases was expressed in *W. J. Wenck*, *supra*, pp. 151-152, as follows:

"Calls for service between the same points are seldom repeated. Traffic is not regular in any given direction. What may be infrequent but fairly regular business to or from a certain State for a small carrier may be only sporadic business for a large carrier; consequently, a frequency of service that might amount to 'grandfather' status rights in the case of the former could conceivably be inadequate in the case of the latter. It would be an impractical solution to carve out oddly shaped areas for service based solely on the frequency of service; consideration must also be given to the general territory served under the holding-out, even if the business in some States may not equal that in other States in the territory."

The Commission took a somewhat similar approach to the problem presented in the instant case. It noted that Fleming was restricted to shipments at points where the manufacturers had established distribution facilities; that those facilities were limited in any given area; that Fleming's opportunity for service was therefore confined to a very few distribution points and his operations were irregular; that less than an estimated seven per cent of all new automobiles sold during 1935 in twenty-four western states were transported by the driveaway method; that distribution points in the automobile industry are constantly shifted; that allowance must be made for frequent changes in points served by a carrier who depends for his traffic entirely upon this one industry; and that Fleming's future opportunity for obtaining traffic will doubtless be as limited as in the past. In view of the scope of his holding out and the nature and characteristics of the highly specialized transportation service rendered, the Commission authorized continuance

of his service to all points in the enumerated states. That is a judgment which we should respect. Certainly we cannot say that it was a wholly inappropriate method for creating that substantial parity between future operations and prior *bona fide* operations which the statute contemplates. The special characteristics of this roving transportation service make tenable the conclusion that Fleming's prior limited opportunity for service could not be preserved unless state wide areas, within the scope of his holding out and partially covered by his previous operations, were kept open for him. That judgment is for the administrative experts not the courts.

Appellant railroad companies also urge that Fleming should not have been awarded any rights under the "grandfather clause" in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal.[3] Thus there was evidence that on and since June 1, 1935, Fleming had been in *bona fide* operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the courts.

Appellant railroad companies also insist that Fleming was not in "bona fide operation" in Oregon because in January, 1936 he obtained in that state a contract carrier permit. The argument is that he could not obtain under the "grandfather clause" common carrier rights in Oregon in the face of his contract carrier status there. Cf. *United States* v. *Maher*, 307 U. S. 148. They further urge that Fleming's operations in Nebraska (one of the states through which his irregular routes were authorzied) were conducted in violation of state law. In that connection reliance is placed on his testimony that in Nebraska he claimed to be

[3] As to California the evidence was less specific than in the other states. Shipping bills showed three deliveries to California aggregating five vehicles, the latest being in December, 1935. In addition there was testimony that shortly prior to the hearing in 1936 deliveries of taxicabs and trucks had been made in that state.

the owner of the vehicles in order to reduce license fees. The expression "in bona fide operation" plainly "does not extend to one operating as a common carrier on public highways of a State in defiance of its laws". *McDonald* v. *Thompson*, *supra*, p. 266. Congress has not, however, conditioned rights under the "grandfather clause" on compliance with state laws. Their violation is material only insofar as it may be relevant to establishing an absence of "bona fide operation". Infractions of state law, however, may be innocent or wilful, minor or considerable. They may or may not concern the right to operate in the state. Furthermore, the status of a carrier under state law may or may not be identical with his status as a common or contract carrier under the Motor Carrier Act. The question whether his operation in a particular state was "bona fide" is a question of fact for the Commission to determine. Such operation might well be in good faith though state laws were infracted. And the fact that an applicant may have to make his peace with state authorities does not necessarily mean that his rights under the "grandfather clause" should be denied or withheld. *See Earl W. Slagle*, 2 M. C. C. 127. Occasional noncompliance with state laws does not *per se* establish a course of conduct which is preponderantly one of evasion. Certainly no such course of conduct can be fairly implied in this case. Our task is ended if there is evidence [illegible] the Commission's finding of *bona fides*. There is such evidence here.

It is urged on the cross appeal that the court below should not have set aside the Commission's inclusion of Arkansas in the certificate. The evidence was that Fleming had served only one locality in Arkansas—the city of Texarkana. He had made three shipments there aggregating twenty-five vehicles. All of those shipments had been made prior to June 1, 1935, the latest being May 12, 1935. Though fourteen months expired between that date and the date of the hearing there was no evidence that any shipments were made to any locality in Arkansas since June 1, 1935. No explanation of that long hiatus was proffered. But § 206(a) requires a finding of "bona fide operation . . . within the territory" not only "on June 1, 1935" but also "since that time". We cannot say that an unexplained failure to make any shipments to Arkansas for over a year "since that time" satisfies the statutory command even though the nature of the highly specialized transportation service involved be given the greatest weight. Cf. *United States* v. *Maher*, *supra*.

A mere holding out will not alone suffice to bridge the long gap extending through and beyond one entire automobile production year, since applicant carries the burden of establishing his right to the statutory grant.

We have considered the other points raised by appellant railroad companies and find them without substance.

Affirmed.

Mr. Justice Roberts did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.